No. _____

In The
Supreme Court of the United States

JEREMIAH W. NIXON,
GOVERNOR OF THE STATE OF MISSOURI,
AND CHRIS KOSTER,
ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Petitioners,

v.

SHIRLEY L. PHELPS-ROPER,
Respondent.

**On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General of Missouri
JAMES R. LAYTON
Solicitor General,
Counsel of Record
JEREMIAH J. MORGAN
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioners

QUESTIONS PRESENTED

1. May a court of appeals disregard "abuse of discretion" review for a district court's denial of a preliminary injunction request by re-weighing the factors and disposing of three of the four factors in two conclusory sentences?

2. Does a bright-line, First Amendment rule differentiate between laws that address intrusive protests at a home and those that address protests in all other locations, permitting states to adequately protect vulnerable captive audiences at home but denying such protection at funerals?

PARTIES TO THE PROCEEDING

Petitioner Jeremiah W. ("Jay") Nixon is the Governor of the State of Missouri. He is substituted in his official capacity in place of former Governor Matt Blunt. Petitioner Chris Koster is the Attorney General of the State of Missouri. He is substituted in his official capacity in place of former Attorney General Jeremiah W. (Jay) Nixon.

Respondent Shirley L. Phelps-Roper is a resident of the State of Kansas and desires to protest at funerals of United States soldiers in the State of Missouri. She brought a complaint for declaratory and injunctive relief to prevent enforcement of Missouri Revised Statute § 578.501 ("Spc. Edward Lee Myers' Law"), which places limits on picketing at funerals.

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The opinion of the United States District Court for the Western District of Missouri denying a preliminary injunction is reported at 504 F. Supp.2d 691, and is reproduced in the appendix at A27-A38. The opinion of the U.S. Court of Appeals for the Eighth Circuit reversing the district court and granting a preliminary injunction is reported at 509 F.3d 480 (8th Cir. 2007), and reproduced in the appendix at A15-A26. The Eighth Circuit panel granted rehearing; the revised opinion is reported at 545 F.3d 685 (8th Cir. 2008), and is reproduced in the appendix at A1-A14.

The January 7, 2009 order of the court of appeals denying rehearing and rehearing en banc, with five judges voting to grant rehearing en banc, is unpublished but is reproduced in the appendix at A39-A40.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2008. App. A1. The court of appeals denied rehearing and rehearing en banc on January 7, 2009. App. A39-A40. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble, and to petition the government for a redress of grievances.

Mo. Rev. Stat. § 578.501 (2006 Cum. Supp.) provides:

1. This section shall be known as "Spc. Edward Lee Myers' Law."
2. It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
3. For the purposes of this section, **"funeral"** means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

STATEMENT OF THE CASE

Shirley Phelps-Roper is a member of the Westboro Baptist Church of Topeka, Kansas (WBC). App. A43. Phelps-Roper alleges that her religious beliefs dictate that homosexuality is "the worst of all sins and indicative of the final reprobation of an individual." App. A44-A45. Accordingly, Phelps-Roper and the WBC believe that "God is punishing America for the sin of homosexuality by killing Americans, including soldiers." App. A45. WBC members regularly picket outside of public buildings, churches, parks, and funerals, including the funerals of individuals who have died while serving the United States in Iraq.

Phelps-Roper claims that the purpose of picketing and protesting near funerals is to use an available public platform to publish the church members' religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. App. A45; *see also Phelps v. Hamilton*, 122 F.3d 1309, 1310 (10th Cir. 1997) (noting that Phelps-Roper's church has conveyed messages at funerals such as "God Hates Fags"; "No Fags in Heaven"; "Fags are Worthy of Death, Rom. 1:32"; "Turn or Burn"; "Fag Church"; "God's Hate is Great"; and "Hate is a Bible Value"). According to Phelps-Roper, funerals are the only place where her religious message can be delivered in a timely and relevant manner. App. A46.

In response to protests and threats of additional protests by the WBC, the Missouri General Assembly enacted a law limiting "Funeral Protests." Mo. Rev. Stat. § 578.501 (2006 Cum. Supp.). Phelps-Roper challenged the constitutionality of § 578.501 in the United States District Court for the Western District of Missouri. App. A43-A60. She sought preliminary and permanent injunctions preventing Missouri from

implementing the statute, which was intended to ensure Missouri citizens safe, secure, and dignified funerals. The district court determined that a preliminary injunction should not be granted because Phelps-Roper had failed to demonstrate a likelihood of success on the merits and irreparable harm, and "the balance of harms among the parties and the public interest" weigh in favor of the state of Missouri and the public. App. A34-A35.

The district court also noted the "significant government interest" in protecting the rights of Missouri citizens to be "free from interference by other citizens while they mourn the death of friends or family." App. A32. The district court found that Phelps-Roper had not demonstrated a likelihood of success in arguing that defendants do not have a significant government interest, nor in arguing that the State's means of protecting that interest is not narrowly tailored. App. A32-A34. Thus the district court denied Phelps-Roper's request for a preliminary injunction. App. A36. Phelps-Roper appealed.

On December 6, 2007, the Eighth Circuit reversed the district court. App. A15-A26. Defendants sought rehearing or rehearing en banc.[1] On October 31, 2008, the Eighth Circuit panel issued its decision on rehearing, and the Defendants again asked for rehearing en banc. App. A1. The second petition for rehearing en banc was denied; five of the eleven active judges indicated that they would grant the petition. App. A39-A40.

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[1] Following receipt of the rehearing request, the Eighth Circuit issued a letter stating that the "petition for rehearing will be held pending a decision by the en banc court in *Planned Parenthood v. Rounds*, No. 05-3093." App. A42. The Eighth Circuit's June 27, 2008, decision in *Rounds* is reported at 530 F.3d 724.

REASONS FOR GRANTING THE PETITION

Though the case below arose in a very specific context, the Eighth Circuit's holdings present broader First Amendment issues. Some arise whenever there is an appeal from a district court decision on a preliminary injunction request. Others arise whenever a legislature, law enforcement officer, or a court considers steps to protect individuals from disruptive and demeaning protests at times and in places that interfere with events of intense personal interest, held of necessity in a public place. In both respects, the holdings of the Eighth Circuit depart in particularly problematic ways from established practice or rules in this Court and in other courts of appeals.

I. The court of appeals' departure from controlling standards of appellate review in preliminary injunction cases undermines the established deference to trial courts and renders the court of appeals a court of general jurisdiction.

The four-part test for deciding whether to issue a preliminary injunction and the standard of review for a decision whether to issue such an injunction were well-established – until the Eighth Circuit's decision here. The Eighth Circuit essentially read out of the test two of its parts, and eschewed the universally accepted abuse of discretion standard for review of the denial of a preliminary injunction, in favor of a new standard in which the court may re-weigh the factors and simply "come to a contrary conclusion." App. A5. The Eighth Circuit's approach, if allowed to stand here and adopted elsewhere, would both skew the injunction analysis and distort the limitations of its review on

appeal. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

A. Contrary to this Court's instructions, the Eighth Circuit has elevated one factor in the test for a preliminary injunction – likelihood of success on the merits – to the point that it has largely, if not completely, erased the other factors.

It is well-established that a district court considers four factors in deciding whether to issue a preliminary injunction. This court most recently stated those factors in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008):

> A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Though wording may vary slightly, every circuit but one has endorsed that four-factor approach,[2] and the

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[2] *Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27, 32 (1st Cir. 2008); *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-57 (3d Cir. 2007); *Equity in Athletics, Inc. v. United States Dept. of Educ.*, 291 Fed. Appx. 517, 519 (4th Cir. 2008); *Avmed Inc. v. BrownGreer PLC*, 300 Fed. Appx. 261, 264 (5th Cir. 2008); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 447 (6th Cir. 2009); *United Air Lines, Inc. v. International Ass'n of Machinists*, 243 F.3d 349, 360-61 (7th Cir. 2001); *Overstreet v. United Bhd. of Carpenters and Joiners*, 409 F.3d 1199, 1207 (9th Cir. 2005); *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008); *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341,

difference in the remaining circuit may be merely semantic.[3]

Here, though the Eighth Circuit cited the long-accepted test, the court then ignored this Court's recent instructions and abridged the standard for relief. The Eighth Circuit based its decision on a single factor: likelihood of success on the merits. It dismissed the remaining three factors in – literally – two conclusory sentences: "we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights." App. A14.

That two-sentence dismissal of three preliminary injunction factors is the very type of cursory analysis this Court rejected in *Winter v. Natural Resources Defense Council*, 129 S. Ct. at 378: "Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion. The court's entire discussion of these factors consisted of one (albeit lengthy) sentence . . . ." The one sentence this Court rejected in *Winter* was much more detailed than the two short sentences in this case. The Court should instruct the Eighth Circuit, as it instructed the district court in *Winter*, that such summary dismissal of preliminary injunction factors is not permissible.

1349 (D.C. Cir. 2008); *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 847 (Fed. Cir. 2008).

[3] *In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 98 (2d Cir. 2006) (stating the factors as "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor").

B. The Eighth Circuit also eliminated deference to the trail court by replacing the established abuse of discretion standard with a *de novo* standard of review for the denial of a preliminary injunction, departing from this Court's mandate.

The abuse of discretion standard for appellate review of the grant or denial of preliminary injunctions has long been a fixture of the American judicial system. Nearly 80 years ago, in *Alabama v. United States*, 279 U.S. 229 (1929), this Court found that it was already "well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Id.* at 230-31 (citing *Meccano, Ltd., v. John Wanamaker*, 253 U.S. 136, 141 (1920); 2 HIGH ON INJUNCTIONS (4th Ed.) § 1696).

In reviewing a preliminary injunction decision, the duty of an appellate court "is not to decide the merits, but simply to determine whether the discretion of the court below has been abused." *Alabama*, 279 U.S. at 231 (citing *United States v. Balt. & Ohio R. R. Co.*, 225 U.S. 306, 325 (1912)); *see also Doran v. Salem Inn, Inc.*, 422 U.S. at 931-32 (holding that the "standard of appellate review is simply whether the issuance of the injunction . . . constituted an abuse of discretion"); *Buffington v. Harvey*, 95 U.S. 99, 100 (1877) (holding that the "granting or dissolution of a temporary injunction stands on the same footing" – "in the sound discretion of the court").

"The basic idea that discretion conveys is choice." Maurice Rosenberg, *Appellate Review of Trial Court*

Discretion, 79 F.R.D. 173, 175 (1978). An "abuse of discretion" standard of review, therefore, permits a trial court to exercise that choice within a range of possible choices even when the appellate court may view the decision as incorrect or one it would not have made. Thus, Professor Rosenberg wrote that a trial court "acting in discretion is granted a limited right to be wrong, by appellate court standards, without being reversed." *Id.* at 176.

> [T]he fact that the higher court does not hold the same view as the trial judge is an insufficient basis for reversing an exercise of discretion, if by that term we mean an area of trial court choice that is shielded from the kind of searching review that is given to a ruling on a question of law.

Id. at 179. *Seven-Up Co. v. O-So Grape Co.*, 179 F. Supp. 167, 172 (S.D. Ill. 1959) ("[L]ikelihood of successfully urging an abuse of discretion in an appellate court is comparable to the chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water.").

Several reasons have been advanced to support the deference afforded a trial court in an abuse of discretion standard. *See id.* at 181-83 (noting reasons, including "bad reasons," such as appellate workload and demoralizing trial judges, as well as "good reasons," such as the impossibility of devising a rule of law to cover all situations, and the "you are there" reason). Regardless of the varying reasons and the different circumstances that may arise for the exercise of discretion, however, it is clear that when an abuse of discretion standard applies, a reviewing court should not ignore the standard and simply substitute its discretion for that of the trial court. This is particularly true for preliminary injunction decisions.

For more than a century this Court has consistently deferred to the "sound discretion of the court" in deciding preliminary or temporary injunctions. *Buffington v. Harvey*, 95 U.S. 99, 100 (1877). For example, in *Doran v. Salem Inn, Inc.*, this Court applied the standard in reviewing a preliminary injunction decision. Although the Court viewed "the question [there to be] a close one," the district court's decision was not an abuse of discretion. 422 U.S. at 932.

An abuse of discretion standard is particularly appropriate for preliminary injunction decisions because the four factors identified above require balancing, *e.g.*, determining whether "the balance of equities tips in ... favor" of the plaintiff. *Winter*, 129 S. Ct. at 374. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 376 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)). Balancing such factors is inherently discretionary.

Deferential review of the trial court under an abuse of discretion standard is also appropriate because a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* , 129 S. Ct. at 376. *See also Yakus v. United States*, 321 U.S. 414, 440 (1944) ("The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff."). Indeed, since "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent," it is all the more important that a deferential abuse of discretion standard is applied by the court of appeals. *Doran v. Salem Inn, Inc.*, 422 U.S. at 931-32.

Here, the Eighth Circuit refused to give the lower court proper deference. The court of appeals stated the appropriate standard of review, but then departed from the standard in its analysis. According to the court of appeals, "[t]he district court weighed these considerations [the preliminary injunction factors] and concluded Phelps-Roper was not entitled to a preliminary injunction. We have weighed these same considerations and come to a contrary conclusion." App. A5.

As a further demonstration of the improper reassessment conducted by the court of appeals, the court concluded that "there is *enough* likelihood Phelps-Roper will be able to prove section 578.501 is not narrowly tailored or is facially overbroad to the point she is likely to prevail on the merits of her claim." App. A12 (emphasis added). This is hardly a finding of an abuse of discretion.

The court of appeals disregarded the standard of review requiring an abuse of discretion; its significant departure from controlling law merits review by this Court.

II. The Eighth Circuit's new bright-line rule, which severely limits the ability of states to protect vulnerable captive audiences from unwelcome, intrusive speech, conflicts with *Hill v. Colorado* and from court of appeals precedent.

The second reason for review is perhaps more important, for it goes to a constitutional rule that will be applied at least to all cases addressing statutory limitations on the time and place of protests that interfere with what are acknowledged to be particularly sensitive, private events. The court of appeals has created a new bright-line rule regarding

state regulation of speech: that outside the home, no one can be considered a vulnerable captive audience deserving of protection from intrusive, confrontational, and unwelcome protests. That rule conflicts with this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), another protest case. And it conflicts with the decision of a court of appeals decision in a nearly identical funeral protest case, *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

A. The Eighth Circuit's rule is based on its own decision that preceded and is incompatible with *Hill v. Colorado*.

The Eighth Circuit's analysis is tied back to *Frisby v. Schultz*, 487 U.S. 474 (1988), where this Court examined the constitutionality of a statute that restricted picketing and protests targeting a specific home. The court recognized that protests in a public forum, such as a street or sidewalk, can interfere with the right to privacy, particularly where the privacy is sought in the home.

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, ... *the home is different*. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech ... does not mean we must be captives everywhere."

Frisby, 487 U.S. at 484 (1988) (citations omitted; emphasis added).

The Eighth Circuit has elevated the phrase, "the home is different," to dispositive constitutional status. In the Eighth Circuit's view, outside the home the concern for a captive audience can never outweigh free speech. The court first expressed that view nearly a

decade ago in *Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999):

> As the Supreme Court said in *Frisby*, "the home is different," and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.

Olmer, 192 F.3d at 1182.

But after the Eighth Circuit decided *Olmer*, this Court considered whether protection of captive audiences was limited to residences. In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court dealt with statutory restrictions on protesters at clinics where abortions were performed. Instead of using the bright-line approach that the Eighth Circuit adopted in *Olmer*, this Court accepted that captive audiences may be protected outside the home in circumstances where the audience is particularly vulnerable and unable, due to circumstances, to avoid the message of the speaker:

> *The right to avoid unwelcome speech* has special force in the privacy of the home, ... and its immediate surroundings, ... but *can also be protected in confrontational settings.*
>
> ****
>
> [W]e have continued to maintain that "no one has a right to press even 'good' ideas on an unwilling recipient."... None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the

> freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

Hill, 530 U.S. at 717-718 (citations omitted; emphasis added). Thus, this Court expressly rejected the approach adopted by the Eighth Circuit in *Olmer* and applied here. This Court should grant the petition and require that the Eighth Circuit revise its precedent to conform to *Hill*.

B. The Eighth Circuit's ruling regarding Missouri's funeral protest law conflicts directly with the Sixth Circuit's decision upholding a similar Ohio law.

Although litigation over the constitutionality of funeral protest laws has been initiated in various locations,[4] to date just one other court of appeals has decided the question. The Sixth Circuit upheld such a statute, applying a test that is incompatible with the Eighth Circuit's bright-line approach. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008).

Like the Eighth Circuit (*see* App. A7), the Sixth Circuit held that the appropriate test was intermediate scrutiny. 539 F.3d at 361; *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Under this test, the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions:

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[4] *See, e.g., McQueary v. Stumbo*, 453 F. Supp.2d 975 (E.D. Ky. 2006); *State v. Sebelius*, 179 P.3d 366 (Kan. 2008); *Hood v. Perdue*, 540 F. Supp.2d 1350 (N.D. Ga. 2008).

(1) Serve a significant governmental interest;

(2) are narrowly tailored; and

(3) leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781 (1989). The Eighth and Sixth Circuits' analysis diverged not just as to the ultimate conclusion, but at each step along the way.

1. Governmental interest. The Sixth Circuit observed that this Court has already recognized the importance of protecting the mourners from public intrusions:

> Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Phelps-Roper v. Strickland, 539 F.3d at 365 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 at 168 (2004); internal quotation marks omitted). The Sixth Circuit found that mourners cannot avoid a message that targets funerals without forgoing their right to partake in funeral or burial services, and so are appropriately viewed as a captive audience. The court then concluded that the circumstances in *Hill* and in funerals were comparable, so the state did have a significant interest in protecting mourners:

> And just as "[p]ersons who [ ] attempt[ ] to enter health care facilities ... are often in particularly vulnerable physical and emotional conditions," *Hill*, 530 U.S. at 729, 120 S.Ct. 2480, it goes without saying that funeral attendees are also emotionally vulnerable.

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> Nor can funeral attendees simply "avert their eyes" to avoid exposure to disruptive speech at a funeral or burial service. The mere presence of a protestor is sufficient to inflict the harm. See *Frisby*, 487 U.S. at 478, 108 S.Ct. 2495 (noting that "the 'evil' of targeted residential picketing" is "the very *presence* of an unwelcome visitor at the home") (emphasis added [by the court]).

Phelps-Roper v. Strickland, 539 F.3d at 366.

Here, the district court noted similar concerns, concluding that Phelps-Roper was not likely to succeed in arguing that Missouri lacked a significant interest. App. A32-A33. But the Eighth Circuit, feeling bound by its decision in *Olmer*, refused to find a sufficient state interest in protecting persons from disruption at any location but their homes, giving little or no weight to the fact that the WBC protests occur and are aimed at a very personal and private event, albeit one that is held, of necessity, in a more public location. App. A9-A10.

2. Tailoring. The Sixth Circuit found the limitations on funeral protests to be comparable to those upheld by this Court in *Frisby*. 539 F.3d at 367-68. The court observed that "properly read, the Funeral Protest Provision restricts only the time and place of speech directed at a funeral or burial service." *Id.* at 368. The court noted that in *Frisby*, this Court "upheld as constitutional an ordinance that completely prohibited focused residential picketing 'before and about' a residence." *Id.* (quoting *Frisby*, 487 U.S. at 483).

Again, the Eighth Circuit took a very different approach that was in large part a natural result of its determination to comply with *Olmer* and restrict protection to homes. But the Eighth Circuit also found that the Missouri statute could be distinguished from the Ohio statute because the Ohio statute included a

definition of "other protest activities," which Missouri's statute lacks. App. A12. In doing so, the Eighth Circuit ignored a fundamental rule of statutory construction and this Court's endorsement and application of that rule.

Missouri law requires that if reasonably possible, statutes must be read in a manner that is consistent with the Constitution. *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. 1988) ("[T]his Court is required to construe this statute in a manner that renders it constitutionally valid if reasonably possible to do so."). Thus, if a reasonable interpretation of this undefined phrase would rescue it from the perceived infirmity, a court is required to adopt that interpretation. This Court dealt with a similar issue in *Osborne v. Ohio*, 495 U.S. 103 (1990). There, this Court looked favorably on the fact that the Ohio Supreme Court read a scienter requirement into the statute at issue. 495 U.S. at 1693 ("[T]he statute's failure, on its face, to provide a *mens rea* requirement is cured by the [Ohio Supreme] court's conclusion that the State must establish scienter under the Ohio default statute specifying that recklessness applies absent a statutory intent provision.").

Like Ohio, Missouri has a default *mens rea* or scienter provision applicable to misdemeanors. *See* Mo. Rev. Stat. §§ 562.016, 562.021.3, and 562.026. As a result, a person could only violate section 578.501 if the person purposely or knowingly engaged in picketing or other protest activities in front of or about any location at which a funeral is held. So, contrary to the Eighth Circuit's conclusion, the statute does, indeed, limit its coverage to activity that targets or disrupts a funeral or burial service.

The Eighth Circuit was also troubled by the use of what it saw as a floating buffer zone, referring to the inclusion of processions in the definition of "funeral."

See Mo. Rev. Stat. 578.501.3 (2006 Cum. Supp.) But the Eighth Circuit again ignored the import of Missouri's scienter requirement – and thus departed from this Court's analysis in *Hill v. Colorado*. There, this Court upheld the use of a floating buffer, relying on the state's scienter requirement to prevent speakers from being forced to get out of the way of a person going to the clinic. *Hill*, 530 U.S. at 713 ("[U]nlike the floating buffer zone in *Schenck*, which would require a protester either to stop talking or to get off the sidewalk whenever a patient came within 15 feet, the "knowingly approaches" requirement in the Colorado statute allows a protester to stand still while a person moving toward or away from a health care facility walks past her."). While the Eighth Circuit may have been concerned about whether Missouri's restriction on protests along funeral processions provided guidance to citizens, it was required to recognize that provision, like the one at issue in *Hill*, must be interpreted in a way that would allow the application of the statute to processions to be upheld.

3. Available alternatives. Finally, the Eighth and Sixth Circuits diverged regarding the available alternatives to protesting at funerals.

Here, the district court concluded that Phelps-Roper may still protest outside of the times and places prohibited by the statute. As the district court noted: "Missouri's funeral protest law does not create a barrier to delivering to the public, by other means, plaintiffs intended message concerning the evils of homosexuality." App. A34. The statute does not prevent protests at public political rallies and other events that would provide ample opportunity to send Phelps-Roper's message. Indeed, such political functions would seem to be a far better venue, since attendees gather for the purpose of considering the future course of state and federal policies. But these

political events are not the only public gatherings where a protester could deliver a message. Communities have festivals where booths can be rented. Parade permits can be obtained. A host of other methods exist for the dissemination of Phelps-Roper's message.

The Sixth Circuit, too, concluded that the WBC has readily available alternatives to protesting at funerals. *See Phelps-Roper v. Strickland*, 539 F.3d at 372.

The Eighth Circuit concluded otherwise, relying on another of its own precedents, *Kirkeby v. Furness*, 92 F.3d 65 (8th Cir. 1996). But that case is readily distinguished. In *Kirkeby*, the statute restricted protesters in targeting the residence of a particular person whose behavior they wished to influence. *Kirkeby*, 92 F.3d at 662. At a funeral, the protesters cannot influence the deceased.

In fact, the WBC apparently does not wish to draw attention even to a particular individual at or connected with the funeral. And mourners are not particularly open to persuasion; they are, in fact, likely to be more closed than the general public to receiving a message other than one that provides comfort in a time of loss. Thus, the setting is used only to deliver a message, not to target a particular audience that cannot be reached by alternative means. *See Phelps-Roper v. Strickland*, 539 F.3d at 372 ("Moreover, mourners at a funeral are not her primary audience, as she openly admits in her brief that a 'funeral is the occasion of her speech, not its audience.'") Because that message is equally valid or invalid regardless of the time or location where it is delivered, Phelps-Roper could deliver it at alternative times and places. It appears that she chooses funerals not because of some functionality related to this location (other locations are equally functional), but for the very reason that it intrudes on the solace of the mourners.

Regardless of whether a protester intrudes in order to force a message upon mourners or for the purpose of gaining public notoriety, the method and the effect are the same: The protester does, in fact, intrude and disrupt the quiet reflection of those in mourning. The Sixth Circuit upheld Ohio's efforts to protect those mourners. The Eighth Circuit's contrary conclusion that Phelps-Roper or other protesters cannot adequately deliver the same message at other times or places without intruding on this captive and vulnerable audience, led that court to create a conflict that merits this Court's attention.[5]

C. In light of the enactment of funeral protest laws in nearly all the states and of the rule's application to other types of laws, the Eighth Circuit's rule has broad implications.

The conflict is pertinent, of course, not just to Ohio and Missouri, nor just to states in the Sixth and Eighth Circuits. Whether there is, in fact, a bright-line test as the Eighth Circuit has held is also critically important to other states and to the federal government. Congress and the legislatures of more than forty states have adopted funeral protest laws similar to the one at issue here.[6] The Missouri and Ohio statutes are

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[5] Like the Eighth and Sixth Circuits, scholars have reached divergent conclusions regarding the constitutionality of funeral protest statutes and the standard to be applied to determine their constitutionality. *See, e.g.*, Christine E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151 (2008); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 101 (2007); Robert F. McCarthy, *The Incompatibility of Free Speech and Funerals: a Grayned-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L. REV. 1469 (2007).

[6] See 38 U.S.C. § 2413 (2006); 18 U.S.C. § 1388 (2006); Ala. Code

representative of those laws. All of those laws are at risk – or perhaps even presumptively invalid – if the Eighth Circuit's test is the right one.

There is no question that disputes over those statutes will continue to arise, and the conflict between the Sixth and Eighth Circuits will persist. WBC claims to "have picketed 40,214 times - preaching on the mean streets of 661 Cities – including in all 50 States (plus Canada and Iraq) –commanding all men to fear God, and give glory to Him, for the hour of His judgment is

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§ 13A-11-17 (LexisNexis Supp. 2007); Ark. Code Ann. § 5-71-230 (2007); Colo. Rev. Stat. § 13-21-126 (2007); Del. Code Ann. tit. 11, § 1303 (2007); Fla. Stat. § 871.01 (2007); Ga. Code Ann. § 16-11-34.2 (2007); Idaho Code Ann. § 18-6409 (Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/26-6 (West Supp. 2008); Ind. Code Ann. § 35-45-1-3 (LexisNexis Supp. 2008); Iowa Code Ann. § 723.5 (West Supp. 2008); Kan. Stat. Ann. § 21-4015 (2007); Ky. Rev. Stat. Ann. §§ 525.055, .145, .155 (LexisNexis Supp. 2007); La. Rev. Stat. Ann. § 14:103 (Supp. 2008); Me. Rev. Stat. Ann. tit. 17A, § 501-A (Supp. 2007); Md. Code Ann. Crim. Law § 10-205 (LexisNexis Supp. 2007); Mass. Ann. Laws ch. 272, § 42A (2007); Mich. Comp. Laws Ann. §§ 123.1112-13 (West 2007); Minn. Stat. Ann. § 609.501 (West Supp. 2008); Miss. Code Ann. § 97-35-18 (West Supp. 2007); Mont. Code Ann. § 45-8-116 (2007); Neb. Rev. Stat. §§ 28-1320-01-1320.03 (2007); N.H. Rev. Stat. Ann. § 644:2-b (LexisNexis Supp. 2007); N.J. Stat. Ann. § 2C:33-8.1 (West Supp. 2008); N.M. Stat Ann. § 30-20B-1-5 (West Supp. 2007); N.Y. Penal Law § 240.21 (McKinney 2000); N.C. Gen. Stat. § 14-288.4 (2007); N.D. Cent. Code § 12.1-31-01.1 (Supp. 2007); Ohio Rev. Code Ann. § 3767.30 (LexisNexis 2005 & Supp. 2008); Okla. Stat. tit. 21, § 1380 (2007); 18 Pa. Cons. Stat. Ann. § 7517 (West Supp. 2008); S.C. Code Ann. § 16-17-525 (Supp. 2007); S.D. Codified Laws §§ 22-13-17- 22-13-20 (2007); Tenn. Code Ann. § 39-17-317 (2007); Tex. Penal Code Ann. §§ 42.055, 42.04 (Vernon Supp. 2008); Utah Code Ann. § 76-9-108 (Supp. 2007); Vt. Stat. Ann. tit. 13, § 3771 (Supp. 2007); Va. Code Ann. § 18.2-415 (Supp. 2008); Wash. Rev. Code Ann. § 9A.84.030 (West Supp. 2008); Wis. Stat. Ann. §§ 947.01, 947.011 (West 2005 & Supp. 2007); Wyo. Stat. Ann. § 6-6-105 (2007).

come!"[7] And presumably the door to disruption having been opened by the WBC, others will decide to use it.

Moreover, the Eighth Circuit's new rule is not limited to funeral protests. It also affects statues and ordinances dealing with protests affecting other places and other events. Most notable among them are protests near abortion clinics – the very type of protest that led to *Hill v. Colorado*. Rather than wait until such a case arises (and rather than require Phelps-Roper, the WBC, and the states to litigate the issues again and again in funeral protest cases), the Court should take up the question of that rule's legitimacy.

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[7] http://www.godhatesfags.com/picketlocations.html (last visited April 6, 2009)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

CHRIS KOSTER
Attorney General of Missouri
JAMES R. LAYTON
Solicitor General
JEREMIAH J. MORGAN
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (facsimile)

Counsel for Petitioners

APPENDIX

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United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 07-1295

Shirley Phelps-Roper,	*	
	*	
Plaintiff-Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States
Jeremiah Nixon,	*	District Court for the
	*	Western District of
Defendant-Appellee,	*	Missouri
	*	
Mark Goodwin,	*	
	*	
Defendant,	*	
	*	
Matt Blunt,	*	
	*	
Defendant-Appellee.	*	

Submitted: October 15, 2007
Filed: October 31, 2008

Before BYE, BOWMAN, and SMITH, Circuit Judges.

BYE, Circuit Judge.

Shirley Phelps-Roper brought suit in the Western District of Missouri, challenging the validity of sections 578.501 and 578.502 of the Missouri revised statutes under the freedom of speech protection of the First Amendment of the U.S. Constitution.[1] Phelps-Roper requested a preliminary injunction to prevent enforcement of section 578.501 until the statute could be reviewed; the district court denied her motion, holding she did not demonstrate she was likely to succeed on the merits, did not demonstrate irreparable harm, and the public interest weighed in favor of upholding the challenged statutory provisions. Phelps-Roper appealed, and this panel reversed the district court's decision, finding Phelps-Roper met the standard for the issuance of a preliminary injunction. *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir.2007). We then granted a petition for rehearing to consider and incorporate the modified standard this court articulated in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir.2008), for demonstrating a sufficient likelihood of success on the merits. Because the result is the same under the modified standard, we revise our opinion accordingly and reverse the district court's decision.

I

Phelps-Roper is a member of the Westboro Baptist Church (WBC) in Topeka, Kansas. Phelps alleges members of her church believe God is punishing America for what WBC considers the sin of homosexuality by killing Americans, including soldiers.

---

[1] Section 578.502 is a fall-back provision to be enacted if section 578.501 is declared unconstitutional. It is not ripe for review at this time since we are only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute.

As part of her religious duties, she believes she must protest and picket at certain funerals, including the funerals of United States soldiers, to publish the church's religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Phelps believes funerals are the only place where her religious message can be delivered in a timely and relevant manner.[2]

On August 5, 2005, Phelps-Roper and other WBC members held a picket and protest near the location of the funeral of Army Spc. Edward Lee Myers in St. Joseph, Missouri. In direct response to the protest, Missouri enacted section 578.501, which criminalizes picketing "in front or about" a funeral location or procession, and section 578.502, which criminalizes picketing within 300 feet of a funeral location or procession, in the event section 578.501 is declared unconstitutional. Section 578.501 states, in pertinent part:

> (1) This section shall be known as "Spc. Edward Lee Myers' Law."
>
> (2) It shall be unlawful for any person to engage in picketing or other protest activities in front of

---

[2] Although the exact content of WBC's group speech at the funerals of soldiers is not part of the record to date, in previous funeral protests the WBC has conveyed messages including "Thank God for Dead Soldiers," "God Blew Up The Troops," "God Hates Fags," and "AIDS Cures Fags." *See* The Westboro Baptist Church Home Page, http:// www. godhatesfags. com/ written/ wbcinfo/ aboutwbc. html (last visited October 23, 2008) (describing the messages on the "large, colorful signs" they display during their "daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth.").

> or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
>
> (3) For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

Mo.Rev.Stat. § 578.501.

Phelps-Roper brought suit under 42 U.S.C. § 1983 alleging these laws invade her First Amendment rights. She seeks: (1) entry of a declaratory judgment finding sections 578.501 and 578.502 unconstitutional; (2) issuance of a preliminary and permanent injunction enjoining enforcement of sections 578.501 and 578.502; and (3) an award of costs, including reasonable attorneys fees, pursuant to 42 U.S.C. § 1988. Phelps-Roper appeals the denial of her motion for preliminary injunction against Jeremiah Nixon, Attorney General of Missouri, and Matt Blunt, Governor of Missouri.[3]

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[3] Phelps-Roper does not appeal with respect to Mark Goodwin, the prosecuting attorney for Carroll County, Missouri. Goodwin and Phelps-Roper filed a stipulation for entry of consent judgment, which would permanently enjoin Goodwin, in his official capacity as prosecuting attorney for Carroll County, and his employees, representatives, agents, servants, assigns, and successors, from enforcing or attempting to enforce §§ 578.501 and 578.502. The district court deferred ruling on the proposed

II

The standard of review for the denial of a motion for preliminary injunction is abuse of discretion. *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir.2000); *Kirkeby v. Furness*, 52 F.3d 772, 774 (8th Cir.1995) (reversing district court's denial of a motion for preliminary injunction to enjoin City of Fargo from enforcing an anti-picketing ordinance). A court considering a motion for preliminary injunction must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest. *Id.* (citing *Dataphase Sys. Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc)). The district court weighed these considerations and concluded Phelps-Roper was not entitled to a preliminary injunction. We have weighed these same considerations and come to a contrary conclusion.

III

Peaceful picketing is an expressive activity

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consent judgment until a final judgment has been entered as to the constitutionality of Missouri's funeral protest statutes. Notwithstanding the agreement between Phelps-Roper and the local prosecutor, we have jurisdiction over this appeal between Phelps-Roper and the governor and attorney general of Missouri. *See Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir.2005); but *see id.* at 1146-48 (Bye, J., dissenting) (concluding Article III jurisdiction is lacking over a Missouri action to enjoin enforcement of an allegedly unconstitutional statute, where the local prosecutor charged with enforcing the statute is not part of the appeal).

protected by the First Amendment. *Olmer v. Lincoln,* 192 F.3d 1176, 1179 (8th Cir.1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality). If Phelps-Roper can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. *See Marcus v. Iowa Pub. Television,* 97 F.3d 1137, 1140-41 (8th Cir.1996); *Kirkeby,* 52 F.3d at 775. Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted); *Kirkeby,* 52 F.3d at 775 (citing *Frisby v. Schultz,* 487 U.S. 474, 479 (1988)). The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. *McQueary v. Stumbo,* 453 F. Supp.2d 975, 979 (E.D.Ky.2006) (granting preliminary injunction to WBC precluding enforcement of Kentucky statute imposing time, place and manner restrictions on gatherings near funerals) (*citing Connection Distrib. Co.,* 154 F. 3d at 288).

We begin with an assessment of the likelihood of success on the merits. In *Planned Parenthood,* 530 F.3d at 732-33, this Court clarified what is required to demonstrate a sufficient showing of likelihood of success on the merits. In general, "courts should still apply the familiar 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something

other than government action based on presumptively reasoned democratic processes." *Id.* Where a party seeks to enjoin preliminarily the implementation of a duly enacted statute-as is the case here-district courts must make "a threshold finding that a party is *likely* to prevail on the merits." *Id.* (emphasis added). The Court reasoned that by re-emphasizing "this more rigorous standard for determining a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id.* at 733. In such cases, it is only after finding a party is likely to prevail on the merits that a district court should weigh the other *Dataphase* factors. *Id.* at 732.

When analyzing the merits of Phelps-Roper's claim, the district court correctly concluded the statute's speech restrictions are content-neutral and subjected the statute to intermediate judicial scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 653 (1994). We reject Phelps-Roper's contention that section 578.501 is content-based because it targets funeral picketing and was enacted for the purpose of silencing her speech in particular. The plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (stating "whether a statute is content neutral or content based is something that can be determined on the face of it...."); *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (stating "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support"

and finding a statute content-neutral despite being enacted to end harassment outside clinics by abortion opponents); *Frisby,* 487 U.S. at 482 (1988) (finding statute content-neutral despite being enacted in response to antiabortion protesters).

Section 578.501 regulates traditional public fora. A traditional public forum is one traditionally used as a forum for expression, such as a public street or a sidewalk. *Boos v. Barry,* 485 U.S. 312, 318 (1988); *Olmer,* 192 F.3d at 1179. While we recognize a cemetery is a nonpublic forum,[4] section 578.501 restricts expressive activity not just within or on the premises of a cemetery or a church, but also on traditional public fora such as the adjacent public streets and sidewalks. The statute must therefore satisfy the standard of review for traditional public fora.

A content-neutral time, place and manner regulation may be imposed in a public forum if it: (1) serves a significant government interest; (2) is narrowly tailored; and (3) leaves open ample alternative channels of communication. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989); *Veneklase v. City of Fargo,* 248 F.3d 738, 744 (8th Cir.2001) (en banc) (upholding the constitutionality of a Fargo ordinance prohibiting the targeted picketing of a residence as a content neutral time, place and manner restriction).

A

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[4] *Warner v. City of Boca Raton,* 420 F.3d 1308, 1310 n. 1 (11th Cir.2005); *Griffin v. Sec'y of Veterans Affairs,* 288 F.3d 1309, 1322 (Fed.Cir.2002); *Warren v. Fairfax County,* 196 F.3d 186, 201 (4th Cir.1999); *Jackson v. City of Stone Mountain,* 232 F.Supp.2d 1337, 1353 (N.D.Ga.2002).

The district court found the state has a significant interest in preserving and protecting the sanctity and dignity of memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress. *Phelps-Roper v. Nixon,* 504 F.Supp.2d 691, 696 (W.D.Mo.2007). The Supreme Court has not addressed this issue, but has recognized the state's interest in protecting citizens from unwanted communications while in their homes, *Frisby,* 487 U.S. at 482, 108 S.Ct. 2495, and when otherwise "captive," *Madsen v. Women's Health Ctr.,* 512 U.S. 753, 768 (1994). One other circuit court, which recently analyzed the constitutionality of similar funeral protest statutes, has extended *Frisby* and acknowledged the state has an interest in protecting mourners, which were found to be a captive audience, from unwanted speech during a burial or funeral. *See Phelps-Roper v. Strickland,* 539 F.3d 356, 362-67 (6th Cir.2008) (finding the state interest was significant); *McQueary v. Stumbo,* 453 F. Supp.2d 975, 992 (E.D. Ky. 2006) (assuming, without finding, for the purpose of preliminary injunction, the state has an interest in protecting funeral attendees from unwanted communications so obtrusive they are impractical to avoid).

We note our own opinion in *Olmer v. Lincoln,* 192 F. 3d 1176, 1178 (8th Cir.1999), which affirmed a preliminary injunction enjoining the enforcement of an ordinance that "restrict[ed] to certain areas the 'focused picketing' of churches and other religious premises thirty minutes before, during, and thirty minutes after any scheduled religious activity" because it violated the First Amendment. In *Olmer,* we held the government has no compelling interest in protecting an individual from unwanted speech outside of the

residential context. *Id.* at 1182 (refusing to allow other locations, even churches, to claim the same level of constitutionally protected privacy afforded to the home by *Frisby*). We stated:

> As the Supreme Court said in *Frisby*, 'the home is different,' and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.

Id. (citation omitted). Because of our holding in *Olmer*, we conclude Phelps-Roper is likely to prove any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech.

B

For a statute to be narrowly tailored, it must not burden substantially more speech than necessary to further the state's legitimate interests. *Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 478, (1989); *Frisby*, 487 U.S. at 485. An overbroad statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798, (1984). To prevail, a plaintiff must show the challenged law either "could never be applied in a valid manner" or it is "written so broadly that [it] may inhibit the

constitutionally protected speech of third parties." *Id.* The district court did not engage in a meaningful analysis of whether section 578.501 is narrowly tailored or overbroad; it found only that the statutory language has plain meaning, which a person of ordinary intelligence could ascertain.

Since we do not decide the merits of Phelps-Roper claim, we decline to engage in a rigorous analysis of whether section 578.501 is overbroad. We do point out the cases upon which the district court relied to support section 578.501's "in front or about" language, *e.g.*, *Frisby*, 487 U.S. 474 (1988) (upholding ordinance concerning targeted picketing "in front of" a particular residence); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir.1996) (upholding a ban on picketing "before, about, or immediately adjacent to" a residence), are distinguishable because they involve residences and fixed locations. Section 578.501, by contrast, defines a "funeral" to include "processions" held in connection with burial and cremation.[5] Mo.Rev.Stat. § 578.501(3). Its "floating" buffer-zones, therefore, provide citizens with no guidance as to what locations will be protest and picket-free zones and at what times. *See Phelps-Roper*, 523 F.Supp.2d at 619-20 (holding the language of the statute applicable to funeral processions was substantially overbroad and burdened substantially more speech than necessary to serve the state's interest), *aff'd Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir.2008).[6]

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[5] A funeral procession may be as few as two cars, according to statute. Mo. Ann. Stat. § 194.500.3.

[6] The district court's order striking down the portion of the Ohio statute applying to funeral processions was not challenged on appeal.

In addition, Section 578.501 does not limit itself to activity that targets, disrupts, or is otherwise related to the funeral, memorial service or procession.[7] *See Olmer*, 192 F.3d at 1180 (finding an ordinance overbroad because it "purports to make the carrying of signs at the indicated times and places unlawful, no matter what the signs say or depict, and this prohibition is much broader than necessary.... [T]he ordinance bans certain forms of communication even if all of those to whom it is directed in fact wish to hear it."). While the Sixth Circuit concluded a similar ordinance was limited to activity that was directed at a funeral or burial service, the statute involved in that case defined "other protest activities" to include "any action that is *disruptive or undertaken to disrupt or disturb a funeral or burial service.*" *Phelps-Roper*, 539 F.3d at 368 (emphasis added). Because the Missouri statute does not contain any such provisions, Phelps-Roper is likely to prove the statute does not limit its coverage to activity that targets or disrupts a funeral or burial service.

We conclude there is enough likelihood Phelps-Roper will be able to prove section 578.501 is not narrowly tailored or is facially overbroad to the point she is likely to prevail on the merits of her claim.

C

The remaining requirement the state must satisfy to defend its time, place and manner restrictions is such restrictions must leave open ample alternative channels for communication of the information. *See*

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[7] We note the Eighth Circuit has found the term "picketing" to include a wide range of activities, including prayer. *Veneklase*, 248 F.3d at 743; *Douglas*, 88 F.3d at 1521.

Ward, 491 U.S. at 791. As the Supreme Court has stated, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 151-52 (1939).

The Eighth Circuit has found other anti-picketing regulations did not leave open ample alternative channels for communication of the information. When addressing whether a permanent injunction should issue in *Kirkeby*, the Court reasoned:

> [P]laintiffs wish to express an opinion about an individual to that individual and others, and they wish to direct their message at that individual.... Therefore, allowing them to picket in the town square or even the next block does not satisfy the second *Ward* requirement [of leaving open ample alternative channels for communication]. These time limits do not give the plaintiffs enough opportunity to direct their intended message at their intended recipients.

Kirkeby v. Furness, 92 F.3d 655, 662 (8th Cir.1996). By analogy, Phelps-Roper presents a viable argument that those who protest or picket at or near a military funeral wish to reach an audience that can only be addressed at such occasion and to convey to and through such an audience a particular message. *Contra Phelps-Roper*, 539 F.3d at 372-73. She is likely to prevail in proving section 578.501 fails to afford open, ample and adequate alternative channels for the dissemination of her particular message.

IV

Because we conclude Phelps-Roper has demonstrated a

likelihood of prevailing on the merits of her claim, we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights. The district court abused its discretion when it concluded the balance of harms weighed toward denying the motion for a preliminary injunction based on its erroneous determination as to Phelps-Roper being unlikely to succeed on the merits.

We emphasize again we do not today determine the constitutionality of section 578.501. We hold only that Phelps-Roper is entitled to a preliminary injunction while the constitutionality of section 578.501 is thoroughly reviewed. The contrary judgment of the district court is reversed.

No. 07-1295

Shirley Phelps-Roper,	*	
	*	
Plaintiff-Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States
Jeremiah Nixon,	*	District Court for the
	*	Western District of
Defendant-Appellee,	*	Missouri
	*	
Mark Goodwin,	*	
	*	
Defendant,	*	
	*	
Matt Blunt,	*	
	*	
Defendant-Appellee.	*	
	*	
	*	
	*	
Thomas Jefferson Center	*	
For the Protection of	*	
Free Expression,	*	
	*	
Amicus on Behalf of,	*	
Appellant,	*	
	*	
Judicial Watch,	*	
	*	
Amicus on Behalf of,	*	
Appellee,	*	
	*	

Submitted: October 15, 2007
Filed: December 6, 2007

Submitted: October 15, 2007
Filed: October 31, 2008

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BYE, Circuit Judge.

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[1] Section 578.502 is a fall-back provision to be enacted if section 578.501 is declared unconstitutional. It is not ripe for review at this time since we are only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute.

I

Phelps-Roper is a member of the Westboro Baptist Church (WBC) in Topeka, Kansas. Phelps alleges members of her church believe God is punishing America for what WBC considers the sin of homosexuality by killing Americans, including soldiers. As part of her religious duties, she believes she must protest and picket at certain funerals, including the funerals of United States soldiers, to publish the church's religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Phelps believes funerals are the only place where her religious message can be delivered in a timely and relevant manner.[2]

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> (2) It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
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> (3) For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

Mo.Rev.Stat. § 578.501.

Phelps-Roper brought suit under 42 U.S.C. § 1983 alleging these laws invade her First Amendment rights. She seeks: (1) entry of a declaratory judgment finding sections 578.501 and 578.502 unconstitutional; (2) issuance of a preliminary and permanent injunction enjoining enforcement of sections 578.501 and 578.502; and (3) an award of costs, including reasonable attorneys fees, pursuant to 42 U.S.C. § 1988. On appeal, Phelps-Roper appeals the denial of her motion for preliminary injunction against Jeremiah Nixon, Attorney General of Missouri, and Matt Blunt, Governor of Missouri.[3]

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[3] Phelps-Roper does not appeal with respect to Mark Goodwin, the prosecuting attorney for Carroll County, Missouri. Goodwin and Phelps-Roper filed a stipulation for entry of consent judgment, which would permanently enjoin Goodwin, in his official capacity as prosecuting attorney for Carroll County, and his employees, representatives, agents, servants, assigns, and successors, from enforcing or attempting to enforce §§ 578.501 and 578.502. The district court deferred ruling on the proposed consent judgment until a final judgment has been entered as to the constitutionality of Missouri's funeral protest statutes.

II

The standard of review for the denial of a motion for preliminary injunction is abuse of discretion. *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir.2000); *Kirkeby v. Furness*, 52 F.3d 772, 774 (8th Cir.1995) (reversing district court's denial of a motion for preliminary injunction to enjoin City of Fargo from enforcing an anti-picketing ordinance). A court considering a motion for preliminary injunction must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest. *Id.* citing *Dataphase Sys. Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc). The district court weighed these considerations and concluded Phelps-Roper was not entitled to a preliminary injunction. We have weighed these same considerations and come to a contrary conclusion.

III

Peaceful picketing is an expressive activity protected by the First Amendment. *Olmer v. Lincoln*, 192 F.3d 1176, 1179 (8th Cir.1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347,

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Notwithstanding the agreement between Phelps-Roper and the local prosecutor, we have jurisdiction over this appeal between Phelps-Roper and the governor and attorney general of Missouri. *See Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir.2005); but *see id.* at 1146-48 (Bye, J., dissenting) (concluding Article III jurisdiction is lacking over a Missouri action to enjoin enforcement of an allegedly unconstitutional statute, where the local prosecutor charged with enforcing the statute is not part of the appeal).

373 (1976) (plurality). If Phelps-Roper can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. *See Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140-41 (8th Cir.1996); *Kirkeby*, 52 F.3d at 775. Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted); *Kirkeby*, 52 F.3d at 775 (citing *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)). The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. *McQueary v. Stumbo*, 453 F. Supp.2d 975, 979 (E.D. Ky. 2006) (granting preliminary injunction to WBC precluding enforcement of Kentucky statute imposing time, place and manner restrictions on gatherings near funerals) (*citing Connection Distrib. Co.*, 154 F. 3d at 288).

We begin with an assessment of the likelihood of success on the merits. At this stage in the litigation, we only assess preliminarily whether Phelps-Roper has a substantial likelihood of prevailing on the merits of her claim. We do not determine the constitutionality of the Missouri statute at issue. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F. 2d 367, 371 (8th Cir.1991) (stating, in considering the likelihood of the movant prevailing on the merits, a court does not decide whether the movant will ultimately win). While "an injunction cannot issue if there is no chance on the merits," *Mid-Am. Real Estate Co. v. Iowa Realty Co.*, 406 F. 3d 969, 972 (8th Cir.2005), the Eighth Circuit has rejected a requirement that a "party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits." *Dataphase*, 640 F.2d at 113. The question is whether Phelps-Roper has a "fair chance of prevailing." *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir.2003).

When analyzing the merits of Phelps-Roper's claim, the district court correctly concluded the statute's speech restrictions are content-neutral and subjected the statute to intermediate judicial scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 653 (1994). We reject Phelps-Roper's contention that section 578.501 is content-based because it targets funeral picketing and was enacted for the purpose of silencing her speech in particular. The plain meaning of the text controls and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (stating "whether a statute is content neutral or content based is something that can be determined on the face of it...."); *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (stating "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support" and finding a statute content-neutral despite its being enacted to end harassment outside clinics by abortion opponents); *Frisby*, 487 U.S. at 482 (1988) (finding statute content-neutral despite its being enacted in response to anti-abortion protesters).

Section 578.501 regulates traditional public fora. A traditional public forum is one traditionally used as a forum for expression, such as a public street or a sidewalk. *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Olmer*, 192 F.3d at 1179. While we recognize a cemetery is a nonpublic forum,[4] section 578.501 restricts expressive activity not just within or on the premises of a cemetery or a church, but also on traditional public fora such as the adjacent public streets and sidewalks. The statute must

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[4] *Warner v. City of Boca Raton*, 420 F.3d 1308, 1310 n. 1 (11th Cir.2005); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed.Cir.2002); *Warren v. Fairfax County*, 196 F.3d 186, 201 (4th Cir.1999); *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, 1353 (N.D.Ga.2002).

therefore satisfy the standard of review for traditional public fora.

A content-neutral time, place and manner regulation may be imposed in a public forum if it: (1) serves a significant government interest; (2) is narrowly tailored; and (3) leaves open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Veneklase v. City of Fargo*, 248 F.3d 738, 744 (8th Cir.2001) (en banc) (upholding the constitutionality of a Fargo ordinance prohibiting the targeted picketing of a residence as a content neutral time, place, manner restriction).

A

The district court found the state has a significant interest in preserving and protecting the sanctity and dignity of memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress. *Phelps-Roper v. Nixon*, 504 F.Supp.2d 691, 696 (W.D.Mo.2007). The Supreme Court has not addressed this issue, but has recognized the state's interest in protecting citizens from unwanted communications while in their homes, *Frisby*, 487 U.S. at 482, and when otherwise "captive," *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994). Two other district courts, which recently analyzed the constitutionality of similar funeral protest statutes, extended *Frisby* and acknowledged the state has an interest in protecting mourners, which were found to be a captive audience, from unwanted speech during a burial or funeral. *See Phelps-Roper v. Taft*, No. 1:06 CV 2038, 2007 WL 915109, at *4-5 (N.D.Ohio Mar.23, 2007) (finding the state interest was significant); *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D.Ky.2006) (assuming, without finding, for the purpose of preliminary injunction, the state has an interest in protecting funeral attendees from unwanted communications so obtrusive they are impractical to avoid).

We note our own opinion in *Olmer v. Lincoln*, 192 F.3d

1176, 1178 (8th Cir.1999), which affirmed a preliminary injunction enjoining the enforcement of an ordinance, which "restrict[ed] to certain areas the 'focused picketing' of churches and other religious premises thirty minutes before, during, and thirty minutes after any scheduled religious activity" because it violated the First Amendment. In *Olmer*, we held the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context. *Id.* at 1182 (refusing to allow other locations, even churches, to claim the same level of constitutionally protected privacy afforded to the home by *Frisby*). We stated:

> As the Supreme Court said in *Frisby*, 'the home is different,' and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.

Id. (citation omitted). Because of our holding in *Olmer*, we conclude Phelps-Roper has a fair chance of proving any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech.

B

For a statute to be narrowly tailored, it must not burden substantially more speech than necessary to further the state's legitimate interests. *Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989); *Frisby*, 487 U.S. at 485. An overbroad statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). To prevail, a plaintiff must

show the challenged law either "could never be applied in a valid manner" or it is "written so broadly that [it] may inhibit the constitutionally protected speech of third parties." *Id.* The district court did not engage in a meaningful analysis of whether section 578.501 is narrowly tailored or overbroad; it found only that the statutory language has plain meaning, which a person of ordinary intelligence could ascertain.

Since we do not decide the merits of Phelps-Roper claim, we decline to engage in a rigorous analysis of whether section 578.501 is overbroad. We do point out the cases upon which the district court relied to support section 578.501's "in front or about" language, *e.g.*, *Frisby*, 487 U.S. 474 (1988) (upholding ordinance concerning targeted picketing "in front of" a particular residence); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir.1996) (upholding a ban on picketing "before, about, or immediately adjacent to" a residence), are distinguishable because they involve residences and fixed locations. Section 578.501, by contrast, defines a "funeral" to include "processions" held in connection with burial and cremation.[5] Mo.Rev.Stat. § 578.501(3). Its "floating" buffer-zones, therefore, provide citizens with no guidance as to what locations will be protest and picket-free zones and at what times. *See Phelps-Roper v. Taft*, 2007 WL 915109 at *6 (holding the language of the statute applicable to floating buffer zones was substantially overbroad and burdened substantially more speech than necessary to serve the state's interest). In addition, Section 578.501 does not limit itself to activity which targets, disrupts, or is otherwise related to the funeral, memorial service or procession.[6] *See Olmer*, 192 F.3d at 1180 (finding an ordinance overbroad because it "purports to make the carrying

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[5] A funeral procession may be as few as two cars, according to statute. Mo. Ann. Stat. § 194.500.3.

[6] We note the Eighth Circuit has found the term "picketing" to include a wide range of activities, including prayer. *Veneklase*, 248 F.3d at 743; *Douglas*, 88 F.3d at 1521.

of signs at the indicated times and places unlawful, no matter what the signs say or depict, and this prohibition is much broader than necessary.... [T]he ordinance bans certain forms of communication even if all of those to whom it is directed in fact wish to hear it."); *McQueary*, 453 F.Supp.2d at 995-96 (finding Kentucky funeral protest statute, which prohibited all congregating, picketing, patrolling, demonstrating or entering property within 300 feet of a funeral whether or not such activities were visible or audible to, interfered with, or were authorized by the funeral attendees, restricted "substantially more speech than is necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid.").

We conclude there is enough likelihood Phelps-Roper will be able to prove section 578.501 is not narrowly tailored or is facially overbroad to the point she has a fair chance of prevailing on the merits of her claim.

C

The remaining requirement the state must satisfy to defend its time, place and manner restrictions is that such restrictions must leave open ample alternative channels for communication of the information. *See Ward*, 491 U.S. at 791. As the Supreme Court has stated, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 151-52 (1939).

The Eighth Circuit has found other anti-picket regulations did not leave open ample alternative channels for communication of the information. When addressing whether a permanent injunction should issue in *Kirkeby*, the Court reasoned:

> [P]laintiffs wish to express an opinion about an individual to that individual and others, and they wish to direct their message at that individual.... Therefore, allowing them to picket in the town square or even the

> next block does not satisfy the second *Ward* requirement [of leaving open ample alternative channels for communication]. These time limits do not give the plaintiffs enough opportunity to direct their intended message at their intended recipients.

Kirkeby v. Furness, 92 F.3d 655, 662 (8th Cir.1996). By analogy, Phelps-Roper presents a viable argument that those who protest or picket at or near a military funeral wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message. She has a fair chance of proving section 578.501 fails to afford open, ample and adequate alternative channels for the dissemination of her particular message.

IV

Because we conclude Phelps-Roper has demonstrated a fair chance of prevailing on the merits of her claim, we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights. The district court abused its discretion when it concluded the balance of harms weighed toward denying the motion for a preliminary injunction based on its erroneous determination as to Phelps-Roper being unlikely to succeed on the merits.

We emphasize again we do not today determine the constitutionality of section 578.501. We hold only that Phelps-Roper is entitled to a preliminary injunction while the constitutionality of section 578.501 is thoroughly reviewed. The contrary judgment of the district court is reversed.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

SHIRLEY PHELPS-ROPER,	)	
Plaintiff,	)	
v.	)	No. 06-4156-CV-C-FJG
JEREMIAH W. NIXON, et al.,	)	
Defendants.	)	

ORDER

Pending before the Court are (1) Plaintiff's Motion for Preliminary Injunction to Prevent Defendants Nixon and Blunt from Enforcing § 578.501 (Doc. No. 3); (2) Plaintiff's Motion for Preliminary Injunction to Prevent Defendant Goodwin from Enforcing § 578.501 in an Unconstitutionally Overbroad Manner (Doc. No. 4); (3) Plaintiff's Motion for Oral Argument on Plaintiff's Motion for Preliminary Injunction Against Defendants Nixon and Blunt (Doc. No. 14); and (4) Non-Party Judicial Watch Inc.'s Motion for Leave to File Brief Amicus Curiae in Support of Defendants (Doc. No. 35).

As a preliminary matter, the Court will **GRANT** non-party Judicial Watch Inc.'s Motion for leave to file brief amicus curiae, and the brief filed as Doc. No. 36 will be treated as properly filed. Moreover, this Court indicated in its previous Order (Doc. No. 28) that it would defer ruling on plaintiff's motion for oral

argument until all the briefs on the motions for preliminary injunction had been filed. Now that the Court has had an opportunity to review the parties' briefs, the Court finds that oral argument is not necessary at this time. Therefore, plaintiff's motion for oral argument (Doc. No. 14) will be **DENIED.**

The Court will now turn to the merits of the motions for preliminary injunction.

I. Plaintiff's Motion for Preliminary Injunction Against Defendants Nixon and Blunt (Doc. No. 3)

A. Background

Plaintiff, a member of the Westboro Baptist Church in Topeka, Kansas, filed this lawsuit on July 21, 2006. Plaintiff alleges that the members of her church believe that homosexuality is a sin and an abomination. See Doc. No. 1, ¶ 7. She further alleges that church members believe that God is punishing America for the sin of homosexuality by killing Americans, including soldiers. Id. Plaintiff states that she and other church members express their religious views through picketing and protesting. Id. at ¶ 8. She indicates that the purpose of picketing and protesting near funerals is to use an available public platform to publish the church members' religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Id. at ¶ 9. Plaintiff indicates that funerals are the only place where her religious message can be delivered in a timely and relevant manner. Id.[1]

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[1] Although the exact content of plaintiff's group's speech at funerals of soldiers is not part of the record in this matter to-date, the Court notes that in previous funeral protests, plaintiff's church has conveyed messages such as "God Hates Fags"; "No

Missouri recently enacted Mo. Rev. Stat. § 578.501 (2006) (which criminalizes picketing "in front or about" a funeral location) and Mo. Rev. Stat. § 578.502 (2006) (which, in the event 578.501 is declared unconstitutional, criminalizes picketing within 300 feet of a funeral location). Plaintiff states that these laws invade her First Amendment rights. In her complaint, plaintiff seeks (1) entry of a declaratory judgment finding Mo. Rev. Stat. §§ 578.501 and 578.502 unconstitutional; (2) issuance of a preliminary and permanent injunction enjoining enforcement of § 578.501; (3) upon making a final declaration that § 578.501 is void or unconstitutional, declaring that § 578.502 is unconstitutional, and entering preliminary and permanent injunctions enjoining enforcement of § 578.502; and (4) an award of costs, including reasonable attorneys fees, pursuant to 42 U.S.C. §1988.

Plaintiffs move for a preliminary injunction to prevent defendants Nixon and Blunt from enforcing § 578.501. They further request bond be set in the amount of $1.00.

B. Standard

The Eighth Circuit uses a four-prong test to determine whether to grant a temporary restraining order. See Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981). The Court considers: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. Id.

Fags in Heaven"; "Fags are Worthy of Death, Rom. 1:32"; "Turn or Burn"; "Fag Church"; "God's Hate is Great"; and "Hate is a Bible Value." See *Phelps v. Hamilton*, 122 F.3d 1309, 131 (10th Cir. 1997).

1. Success on the Merits

Plaintiff argues she is likely to succeed on the merits as Missouri's funeral protest statute is an unconstitutional abridgement of her First Amendment right to free speech. In examining such a claim, the Court must first determine whether the restriction on speech is content-based or content-neutral in order to determine the proper standard of review. Where the speech restriction is content-based, it is subject to strict scrutiny and can be upheld only when necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 642, 653 (1994). On the other hand, where the restriction is content-neutral, it is subject to intermediate scrutiny and survives if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. Turner, 512 U.S. at 642; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Although plaintiff contends that § 578.501 is a content-based speech restriction, a review of the text of the statute compels the Court to find that the statute's speech restrictions are content-neutral. See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002)(J. Kennedy, concurring)(noting that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based."); see also Hill v. Colorado, 530 U.S. 703, 720 (2000)(finding the legislature's intentions irrelevant when a statute was facially neutral). The text of § 578.501 is:

> (1) This section shall be known as "Spc. Edward Lee Myers' Law."
>
> (2) It shall be unlawful for any person to

> engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
>
> (3) For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.[2]

Although § 578.501 indicates that it is named after Spc. Edward Lee Myers, a deceased soldier whose funeral was protested by members of plaintiff's church, this reference alone is insufficient to support an inference that the statute is a content-based restriction on speech, as the statute itself does not describe speech by content. Thus, this Court will examine whether § 578.501 survives intermediate scrutiny, analyzing whether it is narrowly tailored to serve a significant

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[2] Section 578.502 contains the same provisions as § 578.501, except that the language "in front of or about" from § 578.501 is modified to read "within three hundred feet of or about" in § 578.502. Section 578.503 further provides: "The enactment of section 578.502 shall become effective only on the date the provisions of section 578.501 are finally declared void or unconstitutional by a court of competent jurisdiction and upon notification by the attorney general to the revisor of statutes."

government interest and leaves open ample alternative channels for communication.[3]

Initially, the Court notes that defendants assert a significant government interest; protecting the rights of Missouri citizens to be free from interference by other citizens while they mourn the death of friends or family. As noted by defendants, in Frisby v. Schultz, 487 U.S. 474, 482 (1988), the Supreme Court recognized that the state had an interest in protecting citizens in their residences from unwanted communications. Defendants argue that spectators to a funeral are more captive than citizens in their own homes, as a citizen in his or her home could leave or otherwise avoid communications outside his or her residence, whereas a funeral spectator cannot leave the funeral or procession without missing the opportunity to pay last respects to the deceased. Although the state must make a "showing that substantial privacy interests are being invaded in an essentially intolerable manner" when limiting discourse in efforts to protect others, Cohen v. California, 403 U.S. 15, 21 (1971), defendants note that plaintiff's actions of picketing soldiers' funerals and belittling the sacrifices made by soldiers are intolerable actions, making protection of the funeral attendees a substantial interest for the state. In addition, amicus Judicial Watch notes that Missouri also has an interest in protecting funeral attendees' First Amendment rights to free exercise of religion. For all the foregoing reasons, the Court finds that plaintiff has not demonstrated a

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[3] Defendants also argue in their response that plaintiff's protests constitute "fighting words" and are completely unprotected by the First Amendment. The Court will not issue any findings at this time as to whether plaintiff's protests constitute "fighting words," as the contents of plaintiff's protests are not properly in the record as of this date. Instead of looking at the content of plaintiff's speech, the Court finds the better approach at this time is to look to the language of Missouri's statute

likelihood of success in arguing that defendants do not have a significant government interest.

Defendants also argue that the statute is narrowly tailored to limit no more speech than necessary, leaving plaintiff alternative channels through which to convey her message. For a statute to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 478 (1989). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485. However, the time, place, and manner restrictions imposed by the statute to not have to be the least restrictive or least intrusive means of serving the government's legitimate interests. See Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

Here, plaintiff argues that the statute impermissibly prohibits speech on private property and in public for a, noting in particular that § 578.501 creates a floating buffer zone around the path of any funeral procession.[4] However, this Court finds that the language of § 578.501 is similar to that upheld by the Supreme Court in Frisby, 487 U.S. at 85 ("in front of" a particular residence), and by the Eighth Circuit in Douglas v. Brownwell, 88 F.3d 1511 (8th Cir. 1996) (upholding a ban on picketing "before, about, or immediately adjacent to" a residence)). Furthermore, buffer zones have been found to be appropriate means to restrict certain speech. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 769 (1994)(approving 36-foot buffer zone

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[4] Although plaintiff argues that her message is directed at the general public, and not at funeral attendees (and therefore should be subject to different standards than those set forth by the defendants), the Court finds that this argument would be better taken after discovery is complete and after a record could be made.

around entrance to women's clinic); Hill v. Colorado, 530 U.S. 703 (2000) (approving statute creating a buffer zone of eight feet around any individual within 100 feet of the entrance of a health facility in order to engage in oral protest or distribute leaflets, etc). The Court further notes that plaintiff has alternative channels through which she can deliver her message; for instance, plaintiff may still protest outside of the times and places prohibited by the statute. Further, Missouri's funeral protest law does not create a barrier to delivering to the public, by other means, plaintiff's intended message concerning the evils of homosexuality. This Court finds that plaintiff has not demonstrated that she is likely to succeed on the merits of her argument that the statute is not narrowly tailored.

Plaintiff also argues that § 578.501 is both overbroad and vague. Plaintiff states that the statute is overbroad given that it prevents all picketing and protesting at certain times and places regardless of whether the picketing and protesting constitutes "fighting words." Plaintiff also asserts that she has received different interpretations of the law from different law enforcement officials in the state of Missouri. As a preliminary note, the Court agrees with defendants that absent a factual record, injunctive relief should not be granted on plaintiff's assertion that different law enforcement officers have given plaintiff different interpretations of the law. Furthermore, the Court will not find at this early stage of the proceedings that the law's intent is to target only fighting words. The Court declines to find that plaintiff is likely to succeed on the merits of her argument that the statute is overbroad.

Finally, plaintiff argues that § 578.501 is unduly vague, in that (a) the "in front of or about" language is open to broad interpretation, (b) it would be impossible to comply with the "following cessation" requirement

without a publication requirement in the statute regarding the ending time of a funeral; and (c) the statute fails to define "picketing." However, as defendants note, the terms and phrases "picketing," "following the cessation," and "in front of or about" all have plain meanings that a person of ordinary intelligence could clearly ascertain. The Court agrees with defendants for purposes of this motion, and finds plaintiff has not demonstrated that she is likely to succeed on the merits of her argument that the language of the statute is unconstitutionally vague.

Therefore, for all the foregoing reasons, this Court finds that plaintiff has not demonstrated a likelihood of success on the merits of her claims regarding the constitutionality of § 578.501.

B. Irreparable Harm to Movant

Although violations of the First Amendment constitute irreparable harms (see Elrod v. Burns, 427 U.S. 347, 373 (1976); Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999)), plaintiff has not demonstrated a substantial likelihood of success on her First Amendment claims. Further, plaintiff has not demonstrated that other venues are insufficient for conveying her message. Therefore, the Court finds that plaintiff has not demonstrated irreparable harm, and this factor weighs against granting a preliminary injunction.

C. Balance of Harms/Public interest

Plaintiff indicates that the state would suffer no injury if the preliminary injunction were issued, noting that Missouri has other statutes available to punish actual disruptions of funerals that overstep the bounds of peaceful protest. Plaintiff further states that the

injunction is in the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994). Notably, however, the Court finds that at this stage of the proceedings, plaintiff has not demonstrated that Missouri's funeral protest statute violates her constitutional rights. Further, defendants indicate that an injunction will harm both the interests of the state of Missouri and the public, in that "Missouri's interest in providing safe, secure, and dignified funerals to its citizens far outweighs any interest the WBC has in protesting and disparaging such events." See Doc. No. 31, p. 29. This Court agrees with defendants, and finds that both the balance of harms among the parties and the public interest weigh toward denial of the motion for preliminary injunction.

For all the foregoing reasons, plaintiff's motion for preliminary injunction (Doc. No. 3) is **DENIED.**

II. Plaintiff's Motion for Preliminary Injunction to Prevent Defendant Goodwin from Enforcing § 578.501 in an Unconstitutionally Overbroad Manner (Doc. No. 4).

Defendant Goodwin is the prosecuting attorney for Carroll County, Missouri. Plaintiff states that defendant Goodwin informed her that he interpreted § 578.501 as prohibiting all picketing and protests within one hour of a funeral and threatened anyone picketing or protesting within one hour of a funeral with being arrested and held for 24 hours. He informed plaintiff's group that they could protest at a location more than 400 feet away from the site of the funeral, so long as no one continued to protest within an hour of the funeral. Plaintiff alleges that this interpretation of

§ 578.501 is overbroad.

Defendant never filed a response to plaintiff's motion for preliminary injunction. Instead, on November 2, 2006, defendant Goodwin and plaintiff filed a stipulation for entry of consent judgment (Doc. No. 27). The proposed consent judgment submitted by the parties would permanently enjoin Defendant Goodwin, in his official capacity as Prosecuting Attorney for Carroll County, and his employees, representatives, agents, servants, assigns, and successors, from enforcing or attempting to enforce § 578.501 and § 578.502. Plaintiff agreed to waive any claim to attorney fees. Plaintiff states she will move to withdraw her motion for preliminary injunction upon entry of the consent judgment.

On November 17, 2006, Defendants Jay Nixon and Matt Blunt filed suggestions in opposition to the entry of consent judgment as to plaintiff and defendant Goodwin. See Doc. No. 32. In this opposition, defendants note that the prosecutor has a duty to investigate, arrest, and prosecute violations of law that come to his knowledge and for which the police or private complainants have taken no action. State ex inf. McKittrick v. Graves, 144 S.W.2d 91 (Mo. 1940); State ex inf. McKittrick v. Wymore, 132 S.W.2d 979 (1939). Defendants suggest that prosecutorial discretion is not unfettered, and the proposed consent judgment is improper because it (1) restricts the current prosecutor's ability to fulfill his duties as prosecutor; (2) infringes on the rights and duties of his successors as a permanent injunction; and (3) at this stage of the litigation such an injunction is improper as the remaining defendants are defending the validity of the law and the Court has not yet ruled on its validity.

This Court is also concerned about entry of the proposed consent judgment at this early stage of the proceedings, when the Court has not yet entered a final

judgment as to the validity of the law, and has denied plaintiff preliminary injunctive relief. Accordingly, the Court will defer ruling as to the propriety of (1) plaintiff's motion for preliminary injunctive relief against defendant Goodwin (Doc. No. 4), and (2) the proposed consent judgment (Doc. No. 27), until a final judgment has been entered as to the constitutionality of Missouri's funeral protest statutes.

III. Conclusion

For all the foregoing reasons:

(1) Plaintiff's Motion for Preliminary Injunction to Prevent Defendants Nixon and Blunt from Enforcing § 578.501 (Doc. No. 3) is **DENIED;**

(2) A ruling on Plaintiff's Motion for Preliminary Injunction to Prevent Defendant Goodwin from Enforcing § 578.501 in an Unconstitutionally Overbroad Manner (Doc. No. 4) is **DEFERRED** until a final judgment has been entered as to the constitutionality of Missouri's funeral protest statutes;

(3) Plaintiff's Motion for Oral Argument on Plaintiff's motion for Preliminary Injunction Against Defendants Nixon and Blunt (Doc. No. 14) is **DENIED;** and

(4) Non-Party Judicial Watch Inc.'s Motion for Leave to File Brief Amicus Curiae in Support of Defendants (Doc. No. 35) is **GRANTED.**

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge

Dated: 1/26/07.
Kansas City, Missouri.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1295

Shirley Phelps-Roper,

Appellant

v.

Jeremiah Nixon,

Appellee

Matt Blunt,

Appellee

and

Mark Goodwin,

Thomas Jefferson Center
for the Protection of Free Expression,

Amicus on Behalf of Appellant

Judicial Watch,

Amicus on Behalf of Appellee

Appeal from U.S. District Court
for the Western District of Missouri - Jefferson City
(2:06-cv-04156-FJG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge William Jay Riley, Judge Steven M. Colloton, Judge Raymond W. Gruender, Judge Duane Benton and Judge Bobby E. Shepherd would grant the petition for rehearing en banc.

January 07, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1295

Shirley Phelps-Roper,

Appellant

v.

Jeremiah Nixon,

Appellee

Matt Blunt,

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And

Mark Goodwin,

Thomas Jefferson Center for the Protection of Free Expression,
Amicus on Behalf of Appellant
Judicial Watch,
Amicus on Behalf of Appellee

Appeal from U.S. District Court
for the Western District of Missouri - Jefferson City
(2:06-cv-04156-FJG)

ORDER

The petition for panel rehearing in the above matter is granted.

October 31, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

January 09, 2008

Ms. Benicia Livorsi
FAMILY LAW GROUP 6 Westbury Drive
St. Charles, MO 63301-0000

RE: 07-1295 Shirley Phelps-Roper v. Jeremiah

Nixon, et al

Dear Ms. Livorsi:

The court has asked me to inform the parties to this appeal that the pending petition for rehearing will be held pending a decision by the en banc court in Planned Parenthood v. Rounds, No. 05-3093.

Michael E. Gans
Clerk of Court

SRD

Enclosure(s)

cc: Ms. Erica Katherine Bredehoft
Mr. Robert Ryan Harding Mr. Robert M. O'Neil
Mr. Paul Joseph Orfanedes Mr. James Forrest Peterson
Mr. Anthony E Rothert Mr. J. Joshua Wheeler
Honorable Fernando J. Gaitan
Ms. Patricia L. Brune

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

SHIRLEY L. PHELPS-ROPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 06-4156-CV-C-NKL
	)	
JEREMIAH W. NIXON, in his official capacity as Attorney General for the State of Missouri,	)	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
	)	
MARK GOODWIN, in his official capacity as Prosecuting Attorney for Carroll County,	)	
	)	
and	)	
	)	
MATT BLUNT, in his official Capacity as Governor for the State of Missouri,	)	
	)	
Defendants.	)	

INTRODUCTION

1) Plaintiff is a United States citizen and a member of the Westboro Baptist Church (WBC). As part of her religious duties, Plaintiff desires to protest at the funerals of United States soldiers. Plaintiff has frequently participated in these protests throughout the United States and desires to continue said protests in the State of Missouri.

2) This lawsuit charges Mo. Rev. Stat. § 578.501 (2006) and Mo. Rev. Stat. § 578.502 (2006) impermissibly infringe upon individual speech, religious liberty, and assembly rights.

as set forth in the First Amendment to the Constitution of the United States and incorporated to the states by the Fourteenth Amendment.

3) As a result of threatened enforcement of § 578.501 and the lack of clarity about what speech is criminal, plaintiff and other church members have been chilled in their efforts to engage in protected speech activities inspired by their religious beliefs. Defendants are required by virtue of their offices to enforce § 578.501. (Section 578.502 will become effective upon a final determination that § 578.501 is unconstitutional.) Unless defendants are enjoined from enforcing this provision, plaintiff will be irreparably harmed and effectively chilled from expressing her religious beliefs through non-disruptive, non-disorderly picketing and protests that are protected by the First and Fourteenth Amendments.

4) This action seeks entry of a declaratory judgment finding that §§ 578.501 and 578.502, are unconstitutional as well as preliminary and permanent injunction prohibiting the enforcement of these criminal statutes.

JURISDICTION AND VENUE

5) This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. § 1983.

6) Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Local Rule 3.2(a)(2). The primary offices of Defendants Nixon and Blunt, from which they carry out their responsibilities to enforce and implement the challenged provisions of Missouri Law, are located in Cole County, Missouri.

PARTIES

7) Plaintiff is a resident of Topeka, Kansas. She is a member of WBC. The Church follows Primitive Baptist and Calvinist doctrines. Based on these doctrines, church members, including plaintiff, believe that homosexuality is a sin and an abomination. They believe homosexuality is the worst of all sins

and indicative of the final reprobation of an individual; it follows, according to their beliefs, that acceptance of homosexuality by society prompts divine judgment. They further believe that God is punishing America for the sin of homosexuality by killing Americans, including soldiers. Because God is omnipotent to cause or prevent tragedy, they believe that when tragedy strikes it is indicative of God's wrath.

8) Plaintiff and other church members have long expressed their religious views by engaging in picketing and protesting. They have protested at churches, theaters, parades, and demonstrations that they view as promoting homosexuality. For many years, they have also picketed and protested near funerals of gay people, persons who died from AIDS, people whose lifestyles they believe to be sinful but are touted as heroic upon their death, and people whose actions while alive had supported homosexuality.

9) The purpose of picketing and protesting near funerals is to use an available public platform to publish plaintiff and other church members' religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. The funerals of soldiers, in plaintiff's view, have become an internationally watched platform where the question of whether God is cursing or blessing America is being discussed. Plaintiff and her church believe the scriptures teach that an individual who dies on the battlefield for a nation that is at enmity with God cannot go to heaven and, despite the views of public figures, is not a hero. For this reason, it is imperative to plaintiff's faith that the contradictory message from public figures be balanced with scriptural message at the time it is being uttered. Further, plaintiff and other church members believe that funerals, burials, and memorial services are times when the eyes, ears, and hearts of mankind are attending to matters of eternity. Plaintiff and her church believe it is too late for the dead, but not for the living. Also, plaintiff and her church believe one of the great sins of America is idolatry in the form of worshiping the human instead of God, and in America this has taken the form of

intense worship of the dead, particularly soldiers. For all these reasons, this public platform is the only plac where this religious message can and must be delivered in a timely and relevant manner to those attending the funeral and to those participating in the public events and displays outside the funeral.

10) Defendant Jeremiah Nixon is the Attorney General of the State of Missouri. Nixon is the State's chief law enforcement officer and is charged with instituting any proceedings necessary to enforce state statutes. Mo. Rev. Stat. § 27.060 (2006). Under Missouri law, the Attorney General is authorized to aid prosecutors when so directed by the Governor and to sign indictments when directed by the court. Mo.Rev.Stat. § 27.030 (2006). His primary office is located in Jefferson City, Missouri. He is sued in his official capacity.

11) Defendant Mark Goodwin is the Prosecuting Attorney for Carroll County. Goodwin is responsible to commence and prosecute all criminal actions in Carroll County. Mo. Rev. Stat. 56.060.1 (2006). His primary office is located in Carrollton, Missouri. He is sued in his official capacity.

12) Defendant Matt Blunt is the Governor of the State of Missouri. The Supreme Executive power lies with the governor. Mo. Const. Art. 4, § 1. He has the duty to "take care that the laws are distributed and faithfully executed" Mo. Const. Art. 4, § 2His primary office is located in Jefferson City, Missouri. He is sued in his official capacity.

13) Defendants were, at all relevant times, acting under color of state law.

STATUTES

14) The current version of Mo. Rev. Stat. § 578.501 took effect on July 6, 2006, upon being signed by the Governor. It provides, *inter alia*.,

> It shall be unlawful for any person to engage in picketing or other protest activities in front of or

> about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor. Mo. Rev. Stat. § 578.501.2 (2006).

The statute defines the term funeral as meaning "the ceremonies, processions[,] and memorial services held in connection with the burial or cremation of the dead." Mo. Rev. Stat. § 578.501.3 (2006). The current § 578.501 is nearly identical to the former § 578.501, which became law upon being signed February 23, 2006, by the acting governor, Senator Michael Gibbons. The current law expanded the reach of the former law, which had banned pickets and protests only "in front of or about any church, cemetery, or funeral establishment."

15) Recognizing § 578.501 is unconstitutional and will inevitably be invalidated, the legislature enacted a contingent back-up provision-- § 578.502-- to become effective "on the date the provisions of section 578.501 are finally declared void or unconstitutional by a court of competent jurisdiction." Section 578.502 is identical to § 578.501 except that instead of barring protests and picketing "in front of or about" locations, it prohibits the same activities within 300 feet of the same locations.

FACTUAL ALLEGATIONS

16) Plaintiff and other church members have picketed and protested near funerals of American soldiers killed in Iraq and Afghanistan. At all times, Plaintiff's protests were pursuant to her firmly and sincerely held religious beliefs.

17) On August 5, 2005, plaintiff and other church members held a non-disruptive, non-disorderly picket and protest near the funeral of Spc. Edward Lee Myers in St. Joseph.

18) In direct response to the protest and the content of the speech, Missouri Senate Majority Leader Charlie Shields introduced the law that, when enacted, became § 578.501.

19) Section 578.501 and, upon its being found unconstitutional, § 578.502, are known as "Spc. Edward Lee Myers' Law." Mo. Rev. Stat. § 578.501.1 (2006); § 578.502.1 (2006).

20) According to the Governor, the target of the law was the content of the protestors' message: "It is offensive that groups would attempt to spread *a message of hate* as families and friends grieve the loss of a loved one." Office of Governor Matt Blunt, Press Release, "Blunt Signs Law Shielding Mourners; Ending Funeral Protests," available at http://www.gov.mo.gov/press/HB1026070506.htm (last visited July 13, 2006) (emphasis added). The Governor also confirmed that the law is "in response to an August protest in St. Joseph at the funeral of Spc. Edward Myer." *Id.*

21) Violations of §§ 578.501 and 578.502 are Class B misdemeanors. Subsequent violations after a conviction are Class A misdemeanors. Class A and Class B misdemeanors carry the possibility of incarceration in the county jail, imposition of a fine, or both.

22) Since the enactment of § 578.501, plaintiff and other members of her church have desired to conduct pickets and protests near funerals in several Missouri locations, including Anderson, Carrollton, Eugene, Eureka, Jamestown, Kirksville, Liberty, Republic, St. Joseph, St. Louis, and St. Robert.

23) Because plaintiff supports non-violent and law abiding protests and does not want to be arrested herself and wanted to assist other church members in avoiding arrest, she contacted local law enforcement officials to determine how they would interpret § 578.501's vague description "in front of or about any location at which a funeral is held." The Governor, for instance, interprets § 578.501, without any geographic limitations as "ma[king] it illegal for any person or group to

engage in protest within one hour before and one hour following any funeral service." Office of Governor Matt Blunt, Press Release, "Blunt Signs Law Shielding Mourners; Ending Funeral Protests," available at http://www.gov.mo.gov/press/HB1026070506.htm (last visited July 13, 2006)

24) As plaintiff made clear in her letters to law enforcement officials, she and other church members did not desire to disrupt any funeral proceedings but rather to remain a respectful distance from the funeral while remaining in sight of their target audience.

25) Plaintiff also indicated she and other church members intended to continue their practice of remaining in public areas, such as sidewalks, and departing once a funeral begins; however, they would also protest on private property onto which they were invited by the property owner.

26) The responses of Missouri's law enforcement officials to Plaintiff's questions about enforcement of the subject statute and to protestors attempts to comply with the statute were inconsistent:

A. On March 2, 2006, W. Stephen Geeding, Prosecuting Attorney of McDonald County, advised that he would prosecute violations of the new law. He interpreted "in front of or about" as including "any place that is reasonably established as a parking area for funeral attendees" and "apply[ing] to processions to and from the cemetery."

B. On April 13, 2006, George Kapke, attorney for the Liberty Police Chief, advised church members that there would be "a concerted and coordinated effort by law enforcement to enforce the law" but refused to elaborate on what would or would not be considered a violation. Kapke referred church members to the Clay County Prosecuting Attorney. The prosecutor, Daniel White, refused to provide any guidance because church members are not licensed as attorneys in Missouri.

C. On April 20, 2006, Darrell Moore, prosecuting attorney in Greene County, would only advise church members that he intended to vigorously prosecute violations

of the law. He did not reply to follow-up letters attempting to determine how "in front of or about" would be interpreted when deciding whether to prosecute with vigor.

D. On May 16, 2006, Chief Donald King of the Carrollton Police Department advised church members that they could conduct their picketing and protest during the 45 minutes preceding the beginning of a memorial service so long as they remained in a designated spot 100 feet from the church entrance. Plaintiff and other church members made arrangements to travel to Carrollton in reliance upon King's representations. Later in the afternoon May 16the day before the protest-the Prosecuting Attorney for Carroll County, Mark Goodwin, called church members to tell them that he would not honor Chief King's interpretation. Goodwin told church members that he would call them by 4:30 p.m. to advise where the protest could be held, but he did not call as promised. When church members called Goodwin, he told them that they could only protest "on the other side of town" and that if they conducted the picketing and protest as arranged with Chief King, church members would be arrested and their children taken into state custody. Eventually, Goodwin faxed a letter to church members in which he interpreted the statute as barring *all* picketing and protests within one hour of the funeral and threatened anyone picketing or protesting within the one hour before the funeral with being arrested and held for 24 hours. He allowed that a protest could be held in a specific location more than 400 feet away from the site of the funeral, so long as no one continued to protest within an hour of the funeral.

E. On April 22, 2006, when members of plaintiff's church protested in Eugene, Missouri, law enforcement permitted those carrying flags, who demonstrated in favor of America, to fully surround and physically jostle and block WBC protestors. The local sheriff made it clear to WBC members and the media that he was only permitting the protest to occur at any location because the law - at that time - did not cover a funeral being held at a high school.

F. On May 16, 2006, when church members

protested in Jamestown, Missouri, outside a high school, officials lined up school busses and semi-trucks from the door of the school to the end of the parking lot, blocking church members' signs from those who entered the lot and walked into the school.

G. On June 27, 2006, when church members were en route to picket in St. Louis, Missouri, one of the church members phoned the police chief, who was hostile and indicated he felt no need for the conversation about the protestors arriving. During the picket, one officer attempted to charge at the protestors as though to attack them, but another officer had to restrain him and hold him back.

H. On July 8, 2006, when church members were protesting in St. Joseph, Missouri, they were standing in a spot designated by local law enforcement, more than 300 feet from the church where the funeral was scheduled to occur. A line of police officers then came and lined up in front of the church members, including Plaintiff. Plaintiff inquired as to why the officers were blocking their signs and by whose authority this was being done. She was told by one of the officers that he was the police chief and it was being done on his authority. After some time passed and Plaintiff continued to inquire as to why this was being done, the chief approached Plaintiff and said "I just kept you from being arrested." When Plaintiff inquired as to what this meant, the chief said he and his officers were blocking Plaintiff and other church members to keep them from view of the funeral procession. Plaintiff, who had seen no funeral procession, checked with other church members, and found that only one was even aware of a procession and it passed hundreds of yards away, never in the area.

I. On July 9, 2006, when church members protested in Kirksville, Missouri, WBC protestors were required to stay hundreds of feet from the middle school building where the funeral occurred. At the same time, hundreds of members of the Patriot Guard and other community members with signs and flags were permitted to be directly in front of the middle school building. When church members inquired about this

difference in treatment, Chief Jim Hughes of the Kirksville Police Department advised that these demonstrators were "part of the ceremony" and were "waving flags as part of the memorial ceremony," and thus were not subject to the terms of the law. One church member asked Chief Hughes for permission to go into the same physical area, with just a flag in his hand, which he desired to hold upside down, but Chief Hughes declined to give him any response.

27) As a result of the varying interpretations of § 578.501's provisions, plaintiff and other church members reasonably determined they could not engage in non-disruptive, non-disorderly protest and picketing without facing arrest, confiscation of their children, or both on several occasions. Specifically, plaintiff and other church members did not conduct protests and pickets as they had desired at the following places and times:

A. March 4, 2006, Ozark Funeral Home, 100 Spring Street, Anderson, Missouri, from 12:15 to 1:00 p.m.;

B. April 14, 2006, Pleasant Valley Baptist Church, 1600 N. 291 HWY, Liberty, Missouri, from 9:45 to 10:30 a.m.;

C. April 21, 2006, Calvary Baptist Church, 804 US HWY 60 West, Republic, Missouri, from 9:15 to 10:00 a.m.; and

D. May 17, 2006, First Baptist Church, 124 N. Folger Street, Carrollton, Missouri, from 9:15 to 10:00 a.m.

28) Plaintiff or other church members were able to conduct peaceful, orderly protests-with varying geographic and temporal restrictions placed upon them-at the following locations:

A. April 22, 2006, Eugene High School, 14803 HWY 17, Eugene, Missouri, from 11:15 a.m. to noon;

B. May 10, 2006, Ft. Leonard Wood, Outside of Main Gate on Missouri Avenue, St. Robert, Missouri, from 10:15 to 11:00 a.m.;

C. May 16, 2006, Jamestown High School, 222 School Street, Jamestown, Missouri, from 4:00 to 5:00 p.m.;

D. June 27, 2006, Kutis Funeral Home, 5255 Lemay

Ferry Road, St. Louis, Misosuri, from 9:15 to 10:00 a.m.;

E. June 30, 2006, Sacred Heart Church, 350 East Fourth Street, Eureka, Missouri, from 9:15 to 10:00 a.m.;

F. July 8, 2006, Word of Life Church, 3902 N. Riverside Road, St. Joseph, Missouri, from 10:15 to 11:00 a.m.; and

G. July 9, 2006, Kirksville Middle School, 1515 S. Cottage Grove, Kirksville, Missouri, from 1:15 to 2:00 p.m.

29) The protests referred to in the preceding paragraph were held successfully only because local law enforcement officials were willing to share their interpretation of the vague provisions of § 578.501 prior to the protest and otherwise communicate their expectations about how the law could be satisfied. Although the interpretations varied and were not imposed on other groups with opposing messages, plaintiff and other church members complied so as to avoid arrest. After such protests, Plaintiff sent law enforcement letters thanking them for providing them an opportunity to protest and ensuring their safety during those protests. Nevertheless, even on these occasions, § 578.501 was often enforced in a discriminatory manner.

30) During each of the events referenced in ¶¶ 28 and 29, there has been no posting of information or other indication of when the funeral ends. Thus, Plaintiff and other church members have no means of knowing what is "one hour following the cessation of any funeral," making this an impossible provision with which to comply.

31) During each of the events referenced in ¶¶ 28 and 29, there has been no visible posting of information or other indication of any funeral procession route. Thus, Plaintiff and other church members were not able to reasonably ascertain when and where they would be "in front of or about" a funeral procession.

COUNT I

Against All Defendants

Section 578.501 is unconstitutional under the free speech

provisions of the First Amendment

32) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

33) Section 578.501 is a content-based restriction on speech.

34) The government has no legitimate, compelling, or other interest to support § 578.501.

35) Section 578.501 is not narrowly tailored to achieve any compelling government interest.

36) In addition or in the alternative, even if § 578.501 is content-neutral, it fails intermediate scrutiny.

37) In addition or in the alternative, § 578.501 improperly prohibits speech in a public forum.

38) In addition or in the alternative, § 578.501 prohibits speech on private property.

39) In addition or in the alternative, § 578.501 is vague and overbroad.

40) In addition or in the alternative, § 578.501 does not leave open ample alternatives for speech.

COUNT II

Against All Defendants

Section 578.502 is unconstitutional under the free speech provisions of the First Amendment

41) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

42) Upon this Court's final determination that § 578.501 is constitutional, § 578.502 takes effect.

43) Section 578.502 is a content-based restriction on speech.

44) The government has no legitimate, compelling or other interest to support § 578.502.

45) Section 578.502 is not narrowly tailored to achieve any compelling government interest.

46) In addition or in the alternative, even if § 578.502 is content-neutral, it fails intermediate scrutiny.

47) In addition or in the alternative, § 578.502 improperly prohibits speech in a public forum.

48) In addition or in the alternative, § 578.502 prohibits speech on private property.

49) In addition or in the alternative, § 578.502 is vague and overbroad.

50) In addition or in the alternative, § 578.502 does not leave open ample alternatives for speech.

COUNT III

Against All Defendants

Section 578.501 is unconstitutional under the Free Exercise Clause of the First Amendment

51) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

52) The government has no legitimate, compelling, or other interest to support § 578.501.

53) Section 578.501 is not narrowly tailored to achieve any compelling government interest.

54) Section 578.501 improperly restricts the Plaintiff's right to freely practice her religion and express her religious beliefs.

COUNT IV

Against All Defendants

Section 578.502 is unconstitutional under the Free Exercise Clause of the First Amendment

55) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

56) Upon this Court's final determination that § 578.01 is

unconstitutional, § 578.02 takes effect.

57) The government has no legitimate, compelling or other interest to support § 578.502.

58) Section 578.502 is not narrowly tailored to achieve any compelling government interest.

59) Section 578.502 improperly restricts the Plaintiff's right to freely practice her religion and express her religious beliefs.

COUNT V

Against All Defendants

Section 578.501 is unconstitutional under the freedom of association provisions of the First Amendment

60) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

61) The government has no legitimate, compelling, or other interest to support § 578.501.

62) Section 578.501 is not narrowly tailored to achieve any compelling government interest.

63) Section 578.501 improperly restricts the Plaintiff's right to peaceably assemble and associate in violation of the First and Fourteenth Amendments.

COUNT VI

Against All Defendants

Section 578.502 is unconstitutional under the freedom of association provisions of the First Amendment

64) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

65) Upon this Court's final determination that § 578.01 is unconstitutional, § 578.02 takes effect.

66) The government has no legitimate, compelling, or other interest to support § 578.502.

67) Section 578.502 is not narrowly tailored to achieve any compelling government interest.

68) Section 578.502 improperly restricts the Plaintiff's right to peaceably assemble and associate in violation of the First and Fourteenth Amendments.

COUNT VII

Against Defendant Goodwin

Plaintiff's constitutional right to free speech under the First Amendment has been infringed by, Defendant Goodwin's overbroad enforcement of § 578.501

69) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

70) Defendant Goodwin has applied and enforced § 578.501 in a manner that is unduly broad.

71) Defendant Goodwin's interpretation of § 578.501 was contrary to an earlier interpretation given by Carrollton officials, kept changing, and barred *all* protests anywhere within one hour before the funeral.

72) Based on the actions Defendant Goodwin, Plaintiff and other church members reasonably feared arrest, prosecution, and loss of custody of their children if they protested in Carrollton and, as a result, did not protest in Carrollton.

73) The government has no legitimate, compelling, or other interest to support § 578.501 as it is being enforced by Defendant Goodwin.

74) Defendant Goodwin is enforcing § 578.501 by placing unduly broad restrictions on Plaintiff's free speech.

COUNT VIII

Against Defendant Goodwin
Plaintiff's constitutional rights under the
Free Exercise Clause of the First Amendment
have been infringed by Defendant Goodwin's
overbroad enforcement of § 578.501

75) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

76) Defendant Goodwin has applied and enforced § 578.501 in a manner that is unduly broad.

77) Defendant Goodwin's interpretation of § 578.501 was contrary to an earlier interpretation given by Carrollton officials, kept changing, and barred *all* protests anywhere within one hour before the funeral.

78) Based on the actions Defendant Goodwin, Plaintiff and other church members reasonably feared arrest, prosecution, and loss of custody of their children if they protested in Carrollton and, as a result, did not protest in Carrollton.

79) The government has no legitimate, compelling, or other interest to support § 578.501 as it is being enforced by Defendant Goodwin.

80) Defendant Goodwin is enforcing § 578.501 by placing unduly broad restrictions on Plaintiff's religious exercise.

COUNT IX

Against Defendant Goodwin
Plaintiff's constitutional right to free association
under the First Amendment has been infringed
by Defendant Goodwin's overbroad
enforcement of § 578.501

81) Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

82) Defendant Goodwin has applied and enforced

§ 578.501 in a manner that is unduly broad.

83) Defendant Goodwin's interpretation of § 578.501 was contrary to an earlier interpretation given by Carrollton officials, kept changing, and barred *all* protests anywhere within one hour before the funeral.

84) Based on the actions Defendant Goodwin, Plaintiff and other church members reasonably feared arrest, prosecution, and loss of custody of their children if they protested in Carrollton and, as a result, did not protest in Carrollton.

85) The government has no legitimate, compelling, or other interest to support § 578.501 as it is being enforced by Defendant Goodwin.

86) Defendant Goodwin is enforcing § 578.501 by placing unduly broad limitations on Plaintiff's right to peaceably assemble and associate.

WHEREFORE, the plaintiff prays this Court:

A. Enter declaratory judgment finding Mo. Rev. Stat. §§ 578.501 and 578.502 unconstitutional;
B. Issue preliminary and permanent injunction enjoining enforcement of § 578.501;
C. Upon making a final declaration that § 578.501 is void or unconstitutional, declare § 578.502 unconstitutional enter preliminary and permanent injunctions enjoining enforcement of § 578.502;
D. Award plaintiff costs, including reasonable attorneys fees, pursuant to 42 U.S.C. § 1988; and
E. Allow such other and further relief to which plaintiff may be entitled.

Respectfully submitted,

AMERICAN CIVIL
LIBERTIES UNION OF
EASTERN MISSOURI

/s/ Anthony E. Rothert
ANTHONY E. ROTHERT,
Mo. Bar # 44827

American Civil Liberties
Union of Eastern Missouri
4557 Laclede Avenue
St. Louis, Missouri 63108
(314) 361-3635
FAX: (314) 361-3135

COUNSEL FOR PLAINTIFF

BENICIA BAKER-
LIVORSI[1], MO BAR #45077
6 Westbury Drive
St. Charles, Missouri 63301
(636) 947-8181

COOPERATING
ATTORNEY FOR ACLU/EM
COUNSEL FOR PLAINTIFF

[1] Motion to appear *pro hac vice* pending.

No. 08-1244

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, Governor of the State of Missouri, and CHRIS KOSTER, Attorney General of the State of Missouri,

Petitioners,

—v.—

SHIRLEY L. PHELPS-ROPER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

ANTHONY E. ROTHERT
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114

BENICIA BAKER-LIVORSI
6 Westbury Drive
St. Charles, Missouri 63301
(636) 947-8181

Counsel for Respondent

QUESTIONS PRESENTED

1. Did the court of appeals properly apply the abuse-of-discretion standard for reviewing the denial of a preliminary injunction by determining whether the district court's decision was guided by errors of law?

2. Did the court of appeals err in holding Respondent was entitled to a preliminary injunction against a Missouri statute prohibiting all pickets and protest activities, including non-disruptive and peaceful activities on public sidewalks, within a floating buffer zone of at least 300 feet of any funeral- or memorial-service-related activity, including a procession, while reserving judgment on the ultimate constitutional question?

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Respondent Shirley L. Phelps-Roper submits this brief in opposition to the petition for writ of certiorari filed by Jeremiah W. Nixon, Governor of the State of Missouri, and Chris Koster, Attorney General of the State of Missouri.

STATEMENT OF THE CASE

This case arises from Respondent's request for a preliminary injunction while the district court considers the merits of her challenge to Missouri's statutes related to funeral protests. Respondent is a member of Westboro Baptist Church and, based on her religious beliefs, thinks that God is punishing America for what Respondent's faith dictates is the sin of homosexuality. Pet. App. A44-45. In Respondent's view, one method of punishment that God has chosen is allowing Americans to be killed. *Id.* As part of her religious duties, Respondent believes she must protest and picket near certain public events, including certain funerals, to publish her church's religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not obey him. Pet. App. A45.

The statute at issue in these preliminary injunction proceedings, R.S.Mo. § 578.501, bans "picketing and other protest activities in front of or about" any place where memorial-service- or funeral-related activities, including processions, are held.[1]

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[1] Missouri has a back-up statute that prohibits picketing and protest activity within 300 feet of memorial-service- and funeral-related activities. R.S.Mo. § 578.502. Section 578.502 is "effective only on the date the provisions of section 578.501 are

Pet. 2. Violations are misdemeanor offenses for which incarceration is an available sanction.[2] Pet. App. A48. Petitioners admit that the statute targets protests conducted by Respondent and other members of her church. Pet. 3.

Respondent conducts peaceful, non-disruptive protests in public *fora*.[3] Uncertain about the scope of § 578.501 because of its undefined terms, Respondent sought guidance from local law enforcement officials in advance of planned protests throughout the state. Pet. App. A49-A50. Some officials refused to respond. When officials did respond, their interpretations of § 578.501 varied—at times even within a single

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finally declared void or unconstitutional." R.S.Mo. § 578.503. Because this interlocutory appeal involves only the propriety of a preliminary injunction, not a determination of the ultimate validity or constitutionality of § 578.501, the fall-back statute is not implicated at this stage of the case.

[2] The Missouri Attorney General has previously argued with success that he cannot be preliminarily enjoined from enforcing a misdemeanor statute because he cannot independently initiate prosecution of a misdemeanor offense. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139 (8th Cir. 2005). The issue was not raised in this case until a still-pending motion to dismiss filed in the district court on May 21, 2009. In any event, the issue is not a ground for certiorari since it represents a disputed issue of state law.

[3] Contrary to the assertions dispersed throughout the petition, Missouri's proscription of speech is not limited to speech that disrupts or intrudes into a funeral. Neither is there any evidence in the record of any protest conducted by Respondent disrupting or intruding into a funeral, even though Petitioners note that Respondent's church has conducted more than 40,000 protests. Pet. 21.

jurisdiction. For instance, in advance of a protest planned in Carrollton, Missouri, in May 2006, the police chief advised church members that they could conduct their picketing and protest during the forty-five minutes preceding the commencement of a memorial service so long as they remained in a designated spot 100 feet from the entrance of the church where the service was held. Pet. App. A50. Later that day, the prosecuting attorney called church members to tell them that he would not honor the police chief's interpretation of § 578.501. *Id.* The prosecutor eventually advised that church members could only protest "on the other side of town," and that if they conducted the protest as arranged with the police chief, church members would be arrested and their children taken into state custody. *Id.* The prosecutor then faxed a letter to the church members in which he interpreted the statute as barring all picketing and protest within one hour of a funeral. *Id.* He allowed that a protest could be held at a specific location more than 400 feet away from the site of the funeral, so long as no one continued to protest within one hour of the funeral. *Id.* As a result of the inconsistent and ever-changing interpretations of the statute by law enforcement officials in Carroll County, Respondent and other church members feared they would be unable to avoid arrest and, as a consequence, canceled their protest. Pet. App. A52.

Because of the varying interpretations of § 578.501's provisions by local law enforcement officials and the statute's broad and vague terms, Respondent determined that she could not engage in

peaceful picketing and protest in Missouri without risking arrest. Her suit for declaratory and injunctive relief followed.

Respondent sought a preliminary injunction. The district court denied her request. Pet. App. A27-38. Based on its interpretation of relevant precedent, the district court did not believe that Respondent demonstrated that she is likely to prevail on the merits. Pet. App. A35. Following from its conclusion that Respondent was not likely to succeed, the court further determined that Respondent had not demonstrated irreparable harm. *Id.* In similar fashion, the court determined that the balance of harms and public interest did not favor entry of a preliminary injunction because the court had found that Respondent had not shown a violation of her constitutional rights. Pet. App. A36. Respondent filed a notice of interlocutory appeal.

The Eighth Circuit reversed. Pet. App. A15-26. The court employed the familiar four-part test for consideration of a preliminary injunction and reviewed the district court's decision under an abuse-of-discretion standard. Pet.App. A19. Applying its own and this Court's precedent, the Eighth Circuit first held, as a matter of law, that Respondent is likely to succeed on the merits of her challenge to § 578.501. Pet.App. A26. Having found that Respondent is likely to succeed on several of her First Amendment claims, the court then found that the probable loss of First Amendment freedoms constituted irreparable harm, the public interest favors the protection of constitutional rights, and the balance of equities favors constitutionally protected

freedom of expression.[4] Pet. App. A26. The court repeatedly stressed that it was not holding the challenged statute unconstitutional. Pet. App. A16 ("[W]e are only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute."); Pet. App. A20 ("We do not determine the constitutionality of the Missouri statute at issue."); Pet. App. A24 ("[W]e do not decide the merits of Phelps-Roper['s] claim[.]"); Pet App. A26 ("We emphasize again we do not today determine the constitutionality of section 578.501.").

The court later granted Petitioners' request for panel rehearing. Pet. App. A41. The panel reconsidered its opinion in light of *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008), an intervening *en banc* decision requiring those seeking to preliminarily enjoin a state statute to satisfy a "more rigorous standard for demonstrating a likelihood of success on the merits." *Id.* at 732. Utilizing the more rigorous standard, the court again found that Respondent is likely to succeed on several of her First Amendment claims.[5] Pet. App. A10, A12, A13. Its analysis of the other preliminary injunction factors did not change on rehearing. The court again emphasized that it was not making a determination of § 578.501's constitutionality. Pet. App. A2, A11,

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[4] As discussed in greater detail, *infra.*, Petitioners' claim that the Eighth Circuit disposed of three of the four factors in two conclusory sentences is false.

[5] On rehearing, the Eighth Circuit also took note of the Sixth Circuit decision in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), which had been issued after the Eighth Circuit's initial decision. *See* pp. 11-12, *infra*.

A14.

Petitioners' second petitions for panel rehearing and rehearing en banc were denied. Pet. App. A39-40.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS THE QUESTIONS PRESENTED BY PETITIONERS

In its current posture, this case is not an appropriate vehicle to decide the First Amendment question presented for multiple reasons, which include: this is an interlocutory appeal from a decision granting a preliminary injunction, in which the lower courts expressly did not resolve the constitutionality of the statutes at issue; this Court is not the proper venue to address for the first time disputes about the meaning and scope of the challenged statutes; there is no meaningful conflict between the circuits; the Eighth Circuit followed well-established standards for appellate review of preliminary injunctions; and there exist more narrowly tailored state and federal statutes that would better frame the constitutional questions.

A. This Is An Interlocutory Appeal And The Eighth Circuit Expressly Did Not Resolve The Constitutionality Of The Challenged Statutes

Throughout its preliminary injunction decision, the Eighth Circuit stated repeatedly and

unequivocally that it was not ruling on the constitutionality of § 578.501. Pet. App. A2, 14, 16, 20, 24, 26. The district court also has not yet addressed the constitutional claims on the merits.[6] Nor has either lower court even begun to examine the constitutionality of § 578.502, the back-up statute.

A decision about the statutes' constitutional validity should first be made by a lower court. "This Court ... is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). *See also Montejo v. Louisiana,* No. 07-1529, 2009 WL 1443049 at *13 (U.S. May 26, 2009). For that reason, reviewing the constitutional issues before a final determination has been made on a complete record is premature This case presents "no reason to abandon [the Court's] usual procedures in a rush to judgment without a lower court opinion." *FCC,* 129 S.Ct. at 1819.

B. This Court Is Not The Proper Venue To Consider In The First Instance Disputes Over The Meaning And Scope of Missouri State Law

For the first time in their appellate brief (and then only in passing), more extensively in their second petition for rehearing, and now in their petition in this Court, Petitioners urge that—as a

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[6] This case remains pending in the district court, which has set a November 13, 2009, deadline for summary judgment motions and an April 12, 2010, trial date. Respondent intends to move for summary judgment soon.

matter of initial statutory construction— a culpable *mens rea* should be read into each element of the challenged statute. Pet. 17. Petitioners then suggest that § 578.501, once construed as requiring a specific intent as to each element, would be narrowly tailored and not overbroad. *Id.*

Because the issue of the statute's meaning and scope was not raised before the district court, the district court did not address it. Likewise the issue was not properly raised before the Court of Appeals until the second petition for rehearing, so it was not addressed by the reviewing court either. Under these circumstances, this Court should decline to consider the issue. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (holding that where respondent raised arguments for the first time in a response to petitioner's motion for rehearing in the court of appeals it was untimely and precluded consideration). Declining to consider the issue initially in this Court is especially appropriate in this case because Petitioners still have a full opportunity to present their argument to the lower courts in the ongoing proceedings.

Disputes over the meaning of § 578.501, on its face and as applied, can and should be resolved at a hearing on the merits, which has not yet occurred. This is not a case, like *Osbourne v. Ohio*, 495 U.S. 103 (1990), on which Petitioners erroneously rely, where the state supreme court has adopted an

authoritative interpretation of the challenged statute. No court has interpreted the challenged statutes, definitively or otherwise. And in this case there is a real dispute about how the statutes should be construed: Missouri law provides that no culpable mental state is imputed to a misdemeanor statute that, like the statute challenged in this case, does not prescribe a culpable mental state if such an imputation is inconsistent with the purpose of the statute defining the offense or might lead to a result that is unjust. R.S.Mo. § 562.026. If, as Petitioners have contended below, § 578.501 is designed to shield funeral attendees from *any* protest or picketing whatsoever, without regard to content or viewpoint, then it is not apparent that imputation of a culpable mental state is consistent with the purpose of the statute. *See State v. Dennis*, 153 S.W.3d 910, 919-20 (Mo. Ct. App. 2005) (holding there is no culpable mental state for the offense of rape). Accordingly, no *mens rea* is required to violate the statute.

Although this case has been pending for nearly three years, Petitioners have never asked the district court to construe the statute or to either certify the question or to defer federal proceedings on the merits pursuant to *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), so that the determination of any unsettled question of state law can be made by the Missouri courts. This Court is not the appropriate place to address disputed contentions of state law in the first instance, particularly given the procedural posture of this case. Indeed, if Petitioners choose to present their limiting construction to the district court on the merits, it might simplify the resolution

of the constitutional issues.

Similarly, Petitioners have now filed a motion to dismiss in the district court on the ground that they are not the proper party defendants under state law. *See* n.2, *supra*. Respondent disagrees with that contention. However, the fact that the district court has yet to resolve this disputed question of state law affecting the only Petitioners before this Court further highlights the interlocutory nature of this petition and is yet another reason to deny certiorari.

C. There Is No Meaningful Conflict Between The Circuits

Contrary to Petitioners' claims, there is no significant conflict between the Eighth Circuit's decision and the Sixth Circuit opinion in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), that makes the decisions incompatible.[7] The government interest recognized by *Strickland* was limited to the avoidance of unwanted communications that "disrupt or disturb a funeral or burial service" within a fixed zone of defined size in front of a funeral service. *Strickland*, 539 F.3d at 358. As the Eighth Circuit recognized, § 578.501

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[7] Petitioners also overstate the degree of disagreement among scholars. While their views of the concept of funeral protest bans vary and their reasons differ, each of the law review articles cited by Petitioners recognizes that § 578.501 is likely unconstitutional. Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C.L.Rev. 151, 183, 233 (2008); Stephen R. McAllister, 55 Kan. L. Rev. 575, 601, 606 (2007); Robert F. McCarthy, *The Incompatibility of Free Speech and Funerals: a* Grayned-*Based Approach for Funeral Protest Statutes*, 68 Ohio St. L. Rev. 1469, 1497-98, 1508 (2007).

differs from the Ohio statute because it prohibits pickets and protests in front of or about a funeral or funeral procession without regard to whether the speech disrupts or disturbs, or is even targeted at, those attending a funeral or participating in a funeral procession.[8] Pet. App. A12. Petitioners' claim of a conflict is thus overstated because the statutes are easily distinguishable, as both the Sixth Circuit and the Eighth Circuit explained.[9] Until the Eighth Circuit rules on the merits, moreover, there is no ultimate conflict with the Sixth Circuit that requires immediate resolution by this Court.

D. The Court Of Appeals Did Not Adopt A New Standard For Appellate Review Of Preliminary Injunction

Petitioners' claims that the Eighth Circuit created a new standard for appellate review of

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[8] The scope of the challenged statute is especially broad when one considers that a funeral procession in Missouri might be as few as two cars (R.S.Mo. § 194.500.3) and the term "picketing," left undefined by the state, has been interpreted by Eighth Circuit precedent to include a wide range of activities, including prayer. *Veneklase v. City of Fargo*, 248 F.3d 738, 743 (8th Cir. 2001); *Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir. 1996).

[9] The portion of the Ohio statute related to funeral processions, which was less restrictive of speech than the comparable provision of § 578.501, was stricken as unconstitutional by the district court. *Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 619-20 (N.D. Ohio 2007), aff'd *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). This aspect of the district court's decision was not appealed by Ohio officials. On this point, therefore, the decisions of the Ohio and Missouri courts are in accord. Petitioners cite no precedent from this Court or any circuit that would support a holding that Respondent is not likely to succeed on her challenge to § 578.501's floating buffer zone.

preliminary injunctions and, in doing so, departed from this Court's precedents, are premised on a misrepresentation of the decision below and a miscomprehension of this Court's decisions.

The Eighth Circuit properly conducted its review of the district court's denial of a preliminary injunction in this case. Even Petitioners concede that the Eighth Circuit recited the correct standards. Pet. 7. While Petitioners attack the court for "eliminating" the abuse of discretion standard, it is Petitioners who distort the standard beyond recognition by arguing that it insulates the district court from any meaningful review. In *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365 (2008), this Court recently reversed a preliminary injunction because the Court concluded that the lower courts had improperly weighed the factors for granting a preliminary injunction. *See id.* at 378 ("While we do not question the seriousness of [the interests advanced by Plaintiffs], we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy."). The Eighth Circuit engaged in the same process in this case. While Petitioners are dissatisfied with the result, the method employed is sound and review is not warranted merely to correct what Petitioners allege to be an erroneous conclusion.

The Eighth Circuit's review of the district court's conclusion that a preliminary injunction should be denied was especially appropriate in this case because the district court's decision was guided by its erroneous legal conclusion that Respondent is

not likely to succeed on the merits. "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States*, 518 U.S. 81, 100 (1996). Here, the district court's denial of the preliminary injunction was based entirely on conclusions of law, not consideration of disputed factual questions, and the Eighth Circuit's review of that denial was entirely consistent with the standard employed by other circuits. *See, e.g., Newsom ex rel. Newsom v. Albermarle County School Bd.*, 354 F.3d 249, 254 (4th Cir. 2003) ("We review a district court's grant or denial of a preliminary injunction for abuse of discretion. We accept the district court's findings of fact absent clear error, but review its legal conclusions *de novo*." (citations omitted)); *See also United Air Lines Inc. v. Air Line Pilots Ass'n, Intern*, 563 F.3d 257, 269 (7th Cir. 2009); *Jean v. Mass. State Police*, 492 F.3d 24, 27 (1st Cir. 2007); *Cobell v. Norton*, 428 F.3d 1070, 1074 (D.C. Cir. 2005). The district court did not make findings of fact; indeed, while the motion for preliminary injunction was supported by references to facts averred under oath in Respondent's verified complaint, Petitioners presented no evidence in opposition. In reviewing whether the district court had abused its discretion in denying a preliminary injunction, the Eighth Circuit correctly considered whether the decision was directed by erroneous legal conclusions. The Eighth Circuit's application of the abuse-of-discretion standard did not depart from this Court's precedent.

Petitioners' contention that the Eighth Circuit paid insufficient attention to the public interest,

irreparable harm, and the balance of harms is also misplaced. At the outset, in their first question presented and throughout their petition in this Court, Petitioners falsely assert that the Eighth Circuit disposed "in two conclusory sentences" of three of the four factors considered to determine the propriety of a preliminary injunction. Petition at *i*, 7. Petitioners overlook the court's additional analysis:

> Peaceful picketing is an expressive activity protected by the First Amendment. *Olmer v. Lincoln,* 192 F.3d 1176, 1179 (8th Cir.1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). If Phelps-Roper can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. *See Marcus v. Iowa Pub. Television,* 97 F.3d 1137, 1140-41 (8th Cir.1996); *Kirkeby,* 52 F.3d at 775. Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted); *Kirkeby,* 52 F.3d at 775 (citing *Frisby v.*

> *Schultz,* 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. *McQueary v. Stumbo,* 453 F. Supp.2d 975, 979 (E.D. Ky. 2006) (granting preliminary injunction to WBC precluding enforcement of Kentucky statute imposing time, place and manner restrictions on gatherings near funerals) (*citing Connection Distrib. Co.,* 154 F.3d at 288). Pet. App. A5-A6.

The Eighth Circuit's consideration of the additional factors was far more extensive than Petitioners suggest, and it bears no resemblance to the "one (albeit lengthy) sentence" devoid of citation to precedent that this Court found inadequate in *Winter.* In *Winter*, the district court determined that the public interest and balance of harms favored a preliminary injunction in true conclusory fashion: "'The Court is also satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.'" *Winter*, 129 S. Ct. at 378 (*quoting Nat. Res, Def. Council, Inc. v. Winter*, No. 8:07-cv-

00335-FMC-FMOx, 2007 WL 2481037 at *10 (C.D.Cal.)).

While the Eighth Circuit gave greater consideration to factors beyond the likelihood of success on the merits than had the lower courts in *Winter*, this case is also distinguishable in that, unlike *Winter*, it involves a constitutional issue. In concluding that the absence of a preliminary injunction would constitute irreparable harm, that the public interest favors preliminary injunction, and that the balance of harms favors injunctive relief, the Eighth Circuit simply applied this Court's well-established jurisprudence. The loss of First Amendment freedoms constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). To the extent the state has an interest in preventing actual disruptions to funerals, that interest is adequately addressed by pre-existing statutes, at least when weighing the balance of harms at the preliminary injunction stage. *See, e.g.*, R.S.Mo. § 574.010 (peace disturbance), § 574.040 (unlawful assembly); § 574.060 (failure to disperse)

The reason the Eighth Circuit's analysis of the factors beyond likelihood of success on the merits stops where it does is because Petitioners offered no further evidence or argument for the court to consider. In the district court, Petitioners provided no evidence and cited not a single case in support of their position on the factors other than likelihood of success on the merits.[10] In the circuit court, they

[10] In this case, Petitioners merged their argument regarding

again pointed to no evidence, and the cases they cited were limited to the proper standard of review. The lack of evidence and case law put forth by Petitioners in this case stands in stark contrast to *Winter*, in which the Navy provided extensive evidence of harm to the Navy and the public interest. Notably, even the petition neglects to cite a single case to support a holding that Respondent is *not* likely to suffer irreparable harm in the absence of preliminary injunction, that the balance of equities does *not* tip in her favor, or that an injunction is *not* in the public interest, if she is likely to prevail on the merits in this case.

The Eighth Circuit faithfully applied controlling law from this Court both in utilizing the abuse-of-discretion standard of review and in balancing the appropriate factors in determining whether to issue a preliminary injunction. Review by this Court is not warranted.

E. The Existence Of Similar State And Federal Laws Allows This Court To Wait For A Better Vehicle To Address The Constitutional Issues

Petitioners suggest that the fact that the federal government and other states have enacted funeral protest laws is a reason to grant review in

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balance of harms and the public interest. In the related context of an application for a stay pending appeal, this Court recently recognized "[t]hese factors merge when the Government is the opposing party." *Nken v. Holder*, 129 S.Ct. 1749, 1762 (2009).

this case.[11] Just the opposite is true. With the existence of so many other laws on the same topic, this Court can wait for a case with a fully developed record where the scope of the challenged law is either uncontested or authoritatively construed and where the constitutionality of the law has been definitively resolved in a final judgment on the merits.

Section 578.501 is a poor choice for consideration because it is an outlier. Respondent is aware of no other funeral-protest law that criminalizes non-disruptive, peaceful protests on streets and sidewalks within a floating buffer of undefined size. Because of § 578.501's broad scope, consideration of the First Amendment issues in this case at this stage in the proceedings is unlikely to have any bearing on determinations of the constitutionality of more narrow statutes.

II. THE EIGHTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT RESPONDENT HAD ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

The Eighth Circuit did not abuse its discretion in concluding that Respondent is likely to succeed on the merits on four of her First Amendment claims: (1) any interest the state has in protecting mourners from speech outside of a funeral in a public forum is outweighed by the First Amendment right to speak; (2) the challenged statute is not narrowly tailored to any government interest that does exist; (3) the

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[11] *See* Pet. at 20 & n.6.

statute is facially overbroad; and (4) it fails to afford open, ample, and adequate alternative channels for dissemination of Respondent's particular message.[12] Respondent need succeed only on any one of her claims for § 578.501 to be unconstitutional. (Respondent has also challenged § 578.502, which goes into effect once § 578.501 is finally determined to be unconstitutional but which is not subject to this interlocutory appeal.)

In recognizing "the home is different," the Eighth Circuit in this case did no more than quote this Court's statement in *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). *Frisby*, in turn, simply recognized what this Court has frequently said: the home is different. *Id.* at 484-85. In the home, this Court has held, one may escape unwanted messages. *Frisby* repeatedly stressed the private residential location targeted by protests. *Id.* at 483. This case does not involve protests inside cemeteries, churches, or funeral homes or any person's ingress or egress; it involves protests on streets and sidewalks outside residential areas. The Eighth Circuit's determination that Respondent is likely to prevail in resisting Petitioners' efforts to expand *Frisby* beyond the home to peaceful, non-disruptive protests on

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[12] Respondent also asserted that § 578.501 is unconstitutional as a content-based restriction on speech and because it is vague. The Eighth Circuit concluded she is not likely to succeed on her claim that the statute is content-based. Although the issue was fully briefed by the parties, the court did not address her likelihood of success on her vagueness claim. Respondent intends to press the vagueness claim in the district court, which is another reason this case is not a proper vehicle for review of the ultimate constitutional question.

public sidewalks comports with this Court's own description of *Frisby*'s limitations.

Petitioners' reliance on *Hill v. Colorado*, is misplaced. *Hill* did not involve a ban on protests; the statute at issue did not restrict signs, silence any speaker, or have any effect on what a protestor could say while standing on a sidewalk. *Hill v. Colorado*, 530 U.S. 703, 729-30 (2000). In *Hill*, a protestor could stand still while a person going to or from a medical facility walked by her. *Id.* The statute approved in *Hill* only applied within 100 feet of a reproductive health care facility and, even then, only prevented a protestor from approaching within eight feet of someone entering or leaving the clinic. *Id.* at 730. The interest recognized in *Hill*, then, was in preventing "close physical approach" of a protestor making "unwanted communication" within a small, defined area near the entrance of a medical facility. *Id.* at 729. Section 578.501 is not limited to unwanted speech, to close physical approaches, or to protests within a small, well-defined geographic area. The Eighth Circuit properly declined to find that *Hill* prevented Respondent from demonstrating a probability of success on the merits.

This case is more like *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357, 379 (1997), a case that does not earn mention in the petition. In *Schenk*, this Court found a 15-foot floating buffer around persons and vehicles was unconstitutional because it would burden more speech than was necessary to serve relevant governmental interests. *Id.* at 379. *Hill* distinguished *Schenk* on the basis that, unlike the

15-foot floating buffer zone, an 8-foot buffer zone "allows the speaker to communicate at a 'normal conversational distance.'" *Hill*, 530 U.S. at 726-27. Although no court has yet construed what distance constitutes "in front of or about" a location or procession in § 578.501, it must be *at least* 300 feet since that is the distance that will be put in effect after § 578.501 is found unconstitutional. *See* R.S.Mo. § 578.502. The change from "in front of or about" to 300 feet is the only change in the contingent statute. It would defy logic for the legislature to impose a larger floating buffer zone in the back-up statute that becomes effective only if the first statute is found unconstitutional. *See* R.S.Mo. § 578.503. The ban on speech at issue in this case cannot reasonably be construed as allowing communication at anything approaching a normal conversational distance, and Petitioners do not assert otherwise. The Eighth Circuit's determination that Respondent is likely to succeed on the merits is in accordance with *Schenk*.[13]

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[13] The petition also fails to mention *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). While *Madsen* involved an injunction, which this Court concluded was subject to stricter scrutiny than a statute, it is noteworthy that this Court struck down a 300-foot, fixed buffer zone as overly broad. In this case, the buffer is at least 300 feet and floating. In addition, there is no evidence showing any interference with anyone's ingress to or egress from any location.

CONCLUSION

For the reasons stated herein, the writ should be denied.

Respectfully submitted,

Anthony E. Rothert
Counsel of Record
American Civil Liberties
Union of Eastern
Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114

Benicia Baker-Livorsi
6 Westbury Drive
St. Charles, MO 63301
(636) 947-8181

Counsel for Respondent

June 4, 2009